David Schulman Writing Sample

The below writing sample comes from the 2022 BMI Entertainment and Media Law Moot Court Competition hosted by Cardozo Law School. I have included the relevant introductory portions of the brief that were co-written by my partner and I (questions presented, the statement of the case, summary of the argument, standard of review, and conclusion) for purposes of context and then the portion I wrote by myself, which demonstrates my analytical ability and was answering the second question on the retroactive application of the CLASSICS Act. My specific section totals about 14 pages.

David Schulman Writing Sample

No. 20-104

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY POP

Petitioner,

v.

THOMAS DUNCAN

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

David Schulman Writing Sample

QUESTIONS PRESENTED

1. Does the CLASSICS Act align with the constitutional mandate of the Copyright Clause under Art. I Sec. 8 Cl. 8 of the United States Constitution by restoring pre-1972 sound recordings from the public domain and granting such recordings copyright-like protections?
2. Does the CLASSICS Act, as a piece of economic legislation, violate Respondent's due process rights if applied retroactively given its impact on the private contract?

TABLE OF CONTENTS

David Schulman Writing Sample

TABLE OF AUTHORITIES

Page(s)

Cases

David Schulman Writing Sample

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE

Gregory Pop ("Pop") is an aging artist, who has never had the commercial success of Thomas Duncan ("Duncan"), "an established hip-hop artist whose fame skyrocketed after reaching the Billboard Hot 100" with prior hits. (R. at 4). Pop created the sound recording of "San Antonio Fever" in 1970. *Id*. Because his sound recording was created a mere two years before the Sound Recording Act of 1971 (which took effect February 15, 1972), he was "arbitrarily denied royalties for decades with those that have been lucky enough to create music since the passage of the Copyright Amendment of 1971." (R. at 10). As such, his work was unjustly placed into the public domain where it could be exploited without compensation. In 2015, Duncan sampled Pop's "San Antonio Fever" sound recording when making "Fun Guy" pursuant to the contract he signed with Pop. (R. at 4). "Fun Guy" became a "smash hit" globally and was the number one song on the Billboard Hot 100 for almost six months. (R at 4-5). Given the gap in federal copyright laws at this time, Duncan was and has been able to capitalize on "San Antonio Fever" by not paying for digital public performance rights since such rights were not written in the contract. (R. at 5). Beyond not getting paid for the commercial success that Duncan was having on digital streaming services, Pop was never publicly credited by Duncan publicly. (R at 6). While Duncan was being lauded as a "musical genius," Pop received no such praise or recognition for his contribution to "Fun Guy." *Id*.

Congress recognized the economic inequity produced by the Sound Recording Act of 1971, specifically due to its of federal protections for pre-1972 sound recordings, and sought to remedy this disparate treatment by passing the Music Modernization Act ("MMA"). The MMA is split into three titles; only Title II, the CLASSICS Act, is in dispute. The CLASSICS Act

grants copyright protection to pre-1972 sound recordings and allows owners of these recordings to collect royalties for the use of their work on digital streaming services. (R. at 5).

Once the CLASSIC Act was passed in 2018, Pop filed suit in District of Cardozo against Duncan for copyright infringement, pursuant to the amended Chapter 14, Title 17 of the United States Code. (R. at 6). Pop alleged that under the CLASSICS Act his sampled sound recording was now protected by federal law and that he is "entitled to royalties and related damages." *Id.* Both Pop and Duncan subsequently filed for summary judgment. *Id.* The District Court granted Pop's motion and denied Duncan's. *Id.* In making this decision, the District Court held that "the CLASSICS Act comports with Art. I Sec. 8 Cl. 8 of the Constitution" and that applying the Act retroactively to the contract in dispute would not be a violation of Duncan's due process rights. (R. at 6, 10). It found that the CLASSICS Act was constitutional under the Copyright Clause, and Pop's sound recording was covered because it was an original work. In terms of due process, the District found that the CLASSICS Act was not truly applying "retroactively" since Pop was not looking for payment for his song's usage from 2015 to 2018, but only since the MMA took effect, i.e. Duncan is only "liable for his continued uses of this music" since 2018 through now. (R. at 12). It likewise held that any judicial presumption against retroactivity has been overcome and that congressional silence on reliance parties did not mean the CLASSICS Act did not apply to them. (R. at 14, 16).

The Court of Appeals for the Thirteenth Circuit reversed and remanded the District Court's decision. The court held that the CLASSICS Act was not within the purview of the Copyright Clause and that retroactive application of the Act violated Duncan's due process rights. The court declined to view historical practices of restoring previously unprotected works from the public domain as sufficient support for the CLASSICS Act' constitutionality, and it also

found that such restoration violated the "originality" requirement of copyright protection. (R. at 20-23). Likewise, neither pay parity nor the rationale of increasing dissemination were deemed valid congressional purposes as the Act was held to not incentivize creation. (R. at 23-25). As for the retroactive application, the court found it would create a "manifest injustice" on Duncan's contractually settled rights with Pop. (R. at 27). It believed if the Act were to apply to the contract, Pop's restored rights would place a burden too severe on Duncan and could be an unfair impediment to his career given the commercial success of "Fun Guy." (R. at 31-32).

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together, with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence in the light most favorable to the non-moving party. *Id.* The parties have filed cross motions for summary judgment and agree that there are no material facts in dispute.

SUMMARY OF THE ARGUMENT

The CLASSICS Act is constitutional and correctly applies to Gregory Pop's song, "San Antonio Fever." This Act fixes the discrepancy between pre-1972 and post-1972 sound recordings exclusive rights at the federal level, properly preempting state law, in order to finally give pre-1972 authors the fair right to be properly compensated for their work for the first time.

Pop's song is rightfully restored from the public domain. The public domain is not owned by the public, but rather simply freely accessible by all. The CLASSICS Act's restoration of

works that never had the chance to be truly commercialized by their owners restores balance between the utilitarian goal of societal progress with the economic incentive of the individual. As restoration is only available to sound recordings which meet copyright eligibility, these restored sound recordings are considered original works. Additionally, congressional purpose in creating pay parity for artists and in aligning the states with a uniform scheme for pre-1972 sound recordings rights is both rational and constitutionally within the Copyright Clause's mandate.

The CLASSICS Act is meant to be applied in a retroactive manner and does not violate Respondent's due process rights. Congress devised the statute with a clear intention of targeting contracts like the one between Pop and Duncan and for the Act to go into immediate effect once enacted. The goal of the CLASSICS Act is to modernize copyright law by remedying the lack of copyright protections for artists of pre-1972 sound recordings given how the music industry has evolved with technology, particularly with the use of digital streaming. This is the clear and reasonable congressional purpose, which this Court should follow. The CLASSICS Act is economic legislation and thus given a presumption of constitutionality, which means for Duncan's claims to succeed, he must pass a very high bar of congressional irrationality.

This Court should find the CLASSICS Act constitutional and retroactive application not in violation of Respondent's due process rights as to find in favor of Respondent would contradict this Court's past precedent and previous statutory and constitutional interpretations.

ARGUMENT

II. POP IS ENTITLED TO ROYALTIES AND DAMAGES SINCE A RETROACTIVE APPLICATION OF THE CLASSICS ACT IS NOT A VIOLATION OF DUNCAN'S DUE PROCESS RIGHTS.

The U.S. Constitution's Copyright and Patent Clause grants Congress the power to promote the progress of science and useful arts by securing for limited times to authors the exclusive right to their work. U.S. Const. art. 1 § 8, cl. 8. Such a clause provides Congress the ability to create a federal copyright statute that provides copyright owners with the exclusive rights to distribute, reproduce, or publicly perform their works. Copyright owners can also license out their creative works for others to use, such as how Pop did with Duncan in the case at bar. If such an "exclusive right" is violated, the copyright owner is entitled to institute an action for copyright infringement under § 501(b). 17 U.S.C. § 501(b). The CLASSICS Act states,

> Anyone who . . . before the last day of the applicable transition period . . . and without the consent of the rights owner, engages in covered activity with respect to a sound recording fixed before February 15, 1972, shall be subject to the remedies provided in sections 502 through 505 . . . to the same extent as an infringer of copyright . . . . 17 U.S.C. § 1401(a)(1).

Since Duncan has continued to use "San Antonio Fever" in his digital public performances after the passage of the Act, Pop rightfully contends he is entitled to royalties and damages.

Even though Duncan and Pop had entered into a contract concerning reproduction rights of "San Antonio Fever" three years before the Act was signed into law, the Act can still now govern over Duncan's use of the song. The CLASSICS Act can be applied retroactively to contracts made before the passage of the Music Modernization Act. Although the retroactive application of laws can bring up issues of due process, there is no such concern here. *See* Harrington, Matthew P., "Symposium: Retroactivity of Law: Foreword: The Dual Dichotomy of Retroactive Lawmaking," (1997) 3 ROGER WILLIAMS U. L. REV. 20 [hereinafter "Symposium: Retroactivity"] (. . . "[T]here is always some controversy attending the promulgation of a legal rule that might affect past transactions or relationships."). While criminal cases may be far

sterner in restricting retroactive laws, in the civil context, Congress has the unequivocal ability to legislate both prospectively and retrospectively. *See* U.S. Const. art. 1 § 9, cl. 3 (prohibiting ex post facto laws); *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977) (. . . "[N]or is the ex post facto law provision of the Constitution applicable to other than criminal statutes."); Symposium: Retroactivity ("The Supreme Court has been surprisingly rigid in its approach to retroactive legislation in the criminal context."). While this Court still has the judicial power to constitutionally review any act, it has generally found a presumption of constitutionality when dealing with economic legislation. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . one complaining of a due process violation [has] to establish that the legislature has acted in an arbitrary and irrational way."); Symposium: Retroactivity ("Where economic legislation is concerned, however, the Court has been quite lenient in permitting a great deal of retroactivity.").

Additionally, Duncan's right to due process was not violated simply because his reliance on the contract has changed. While states cannot create laws which abridge its citizens contractual obligations, Congress does have just such authority. U.S. Const. art. 1 § 10, cl. 1. Although a private relationship may be altered by federal action, this does not automatically mean that the party negatively impacted has had their due process rights infringed upon. Congress has the power to change private contracts through legislative action without a presumption of due process violation. *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) ("[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."). Moreover, Duncan's lack of formal notice regarding the effect of the CLASSICS Act on his contract with Pop does not make such

legislative action completely unforeseeable nor does it make the CLASSIC's Act retroactive application too large a hindrance.

As such, the District Court for the District of Cardozo properly held that the CLASSICS Act should apply retroactively to this contract since the Copyright Clause "empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause." *Eldred*, 537 U.S. at 222. Copyright legislation especially is usually given deference by courts. *Id.* at 188. Thus, this Court should reverse the Court of Appeals for the Thirteenth Circuit and apply the Act retroactively as the clear Congressional intention of providing royalties to aging, pre-1972 artists is a rational basis for the economic legislation, which does not violate Duncan's due process rights.

A. Congress has the Power to Legislate Both Prospectively and Retroactively and Since the CLASSICS Act has a Rational Basis for Retroactive Application, There is no Due Process Violation.

Some laws are only able to be applied prospectively as to apply them retrospectively would be unconstitutional. However, Congress still has the power to enact retroactive laws, especially regarding economic legislation. If the legislation applying retroactively is not "particularly 'harsh and oppressive' then it does not offend due process rights." *R.A. Gray & Co.*, 467 U.S. at 733 (internal citations omitted). Mathematical precision of inequality is not necessary nor is the mere fact that there is now "some inequality" an instant bar to retroactivity. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 167 (1980).

1. The CLASSICS Act is a piece of economic legislation and thus is given a presumption of constitutionality.

Economic legislation by Congress is presumed to be constitutional. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 451 (1988); *see also Sheridan Square P'ship v. United States*, 66 F.3d 1105 (10th Cir. 1995) ("Although the Due Process Clause places more stringent

constraints upon the retroactive reach of Congress . . . we . . . favor retroactive economic legislation with a presumption of constitutionality and uphold such legislation unless the challenging party proves it to be arbitrary or irrational."). When economic legislation is applied retroactively, a due process challenge means the law is reviewed under a rational basis test. *R.A. Gray & Co.*, 467 U.S. at 729.

The CLASSICS Act is a piece of economic legislation as fundamentally all legislation that concerns wealth, businesses, and contracts is categorized as such. Tax, retirement benefit, and employee disability benefit laws are examples of laws categorized as economic legislation and which have been challenged due to their retroactive application. *See United States v. Carlton*, 512 U.S. 26 (1994) (tax); *R.A. Gray & Co.*, 467 U.S. at 717 (retirement benefits); *Usery*, 428 U.S. at 1 (employee disability benefits). The CLASSICS Act provides copyright-like protections to pre-1972 artists and allows them to earn royalties from digital streaming. Just like tax or retirement laws, Congress wanted to change the economics of copyright and so a presumption of constitutionality is to be applied to the CLASSICS Act. Since there is a presumption of constitutionality, Duncan has a high burden to overcome in showing that there is no rational basis for this Act or that Congress acted in an arbitrary manner. *See Usery*, 428 U.S. at 15. The increase in cost to Duncan caused by paying Pop more is simply not at the "harsh and oppressive" level needed to negate retroactivity. Likewise, the argument that Pop's potential power to deprive Duncan of digitally streaming "Fun Guy" will be too great is an insufficient claim to make the Act unconstitutional.

2. The legislative history of the CLASSICS Act clearly demonstrates that Congress intended for the act to apply to contracts like the one between Pop and Duncan.

"[W]here the congressional intent is clear, it governs." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). Previous congressional actions regarding copyright

provide further evidence that the CLASSICS Act is to be applied retroactively. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 122 (2000) (*"*Congress' actions in this area have evidenced a clear intent").

The CLASSICS Act is clear that it is meant to protect the interests of pre-1972 sound recording artists. Both the Senate and House bills of the Act state the exact same phrase,

> Anyone who, prior to February 15, 2067, performs publicly by means of digital audio transmission a sound recording fixed before February 15, 1972, without the consent of the rights owner, shall be subject to the remedies provided in sections 502 through 505 to the same extent as an infringer of copyright." CLASSICS Act, S. 2393, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/senate-bill/2393/text; CLASSICS Act, H.R. 3301, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/house-bill/3301/text.

Duncan's usage of "San Antonio Fever" clearly falls under such a provision.

Moreover, statements made by Congress and individual congressmen are incredibly important in helping this Court understand the purpose of the Act. *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202-07 (1979). "According to the House Report, the purpose of the CLASSICS Act is to assist 'older artists who have highlighted the negative impact upon their ability to survive economically as they increasingly enter their retirement years.'" Mary LaFrance, *Music Modernization and the Labyrinth of Streaming*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 310 (2018) (quoting from H.R. Rep. No. 115-651, at 15 (2018)) (reporting on one of the MMA's predecessor bills, H.R. 5447, 97th Cong. (1983)). At seventy-seven, Pop is an older artist near retirement and is one who has unfortunately never had the commercial success that Duncan is now experiencing. The House Report also details how the CLASSICS Act will not be an unjustifiable impediment to the music industry or to artists like Duncan. On the difference between pre-1972 and post-1972 sound reocrdings, the House writes,

> Despite this discrepancy, in royalties payable for works, the Committee recognizes that music services have been able to successfully operate while paying royalties for post-72 works. Thus, the Committee believes that these same services should be able to continue to successfully operate with a statutory requirement to pay royalties for pre-72 works to enable older artists and their families to benefit financially from their creativity. H.R. Rep. No. 115-651, at 15 (2018).

Congress thus considered the impact of the law's retroactivity and still saw it fit to implement the Act in such a manner since the "same services," would "be able to continue to successfully operate." *Id.* The fact that the CLASSICS Act had unanimous support in both the House and Senate also further showcases Congress' unequivocal intent here.

A co-sponsor's words on an Act are especially instructive since they helped introduce it. *Lewis v. United States*, 445 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."). Senator Orin Hatch, a co-sponsor to the MMA, stated after the bill's passage, "Our music licensing laws are convoluted, out of date and don't reward songwriters fairly for their work. They've also failed to keep up with recent, rapid changes in how Americans purchase and listen to music." Randy Lewis and Randall Roberts, *Music industry hails passage of the Music Modernization Act*, L.A. Times, (Oct. 11, 2018, 2:35 PM), https://www.latimes.com/entertainment/music/la-et-ms-music-modernization-act-20181011-story.html; *See also* Congressional Record Senate Articles (2022), https://www.congress.gov/congressional-record/2018/09/18/senate-section/article/S6259-5 (detailing further comments by Senator Hatch on the Music Modernization Act). Senator Hatch's unambiguous declaration demonstrates the Act's purpose of applying retroactively.

Finally, any concern over the music industry giving pushback is unfounded as the Senate directly received the industry's support of the CLASSICS Act. During a Senate Judiciary Committee Hearing regarding the MMA, the President of the Recording Industry Association of America (RIAA), Mitch Glazier stated that he agreed with a characterization by famous, older artist Smokey Robinson regarding the gap in copyright laws on pre-1972 artists' protections before this Act's passage. He stated that the CLASSICS Act would correct a "quirk in the law" and close the "loophole" that Senator Hatch and others recognized in creating the bill. Protecting

and Promoting Music Creation for the 21st Century: Hearing Before the Com. on the Judiciary, 115 Cong. 10 (2018) (Statement of Mitch Glazier). Since the RIAA's members consists of record labels and distributors, this organization is representative of the many organizations currently paying royalties to artists. Glazier's statement demonstrates the RIAA's support for providing artists like Pop with their long-awaited copyright-like protections and royalty payments for digital streaming.

3. Statutory interpretation evinces further retrospective intent.

Statutory construction can determine whether an Act is to be applied retroactively. *Litton Sys., Inc. v. Am. Telephone and Telegraph Co.*, 746 F.2d 168, 174 (2d Cir. 1984). Plain meaning, or "textualism," is the dominant mode of statutory construction in the federal courts. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) (holding that plain meaning prevails).

The text of the statute designates "Anyone" is subject to the CLASSICS Act and then explicitly adds specific exceptions for "certain authorized transmission and reproductions." 17 U.S.C. § 1401(a)-(b). Anyone is defined as "any person at all." *Anyone*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/anyone (last visited Feb. 20, 2022). Duncan qualifies under this plain meaning of anyone, and he does not fall under the carve outs of the statue. In addition to "anyone," the statute further specifies that any new copyright protection of pre-1972 songs would end on or before February 15, 2067. 17 U.S.C. § 1401(a)(2)(B)(iv). This aspect of the Act was Congress's way of creating an explicit time limit on any new artist's obligations to the legacy artist for use of a pre-1972 sound recording. Combining the plain meaning presented here with the whole text, the CLASSICS Act can be read as retroactively applying to the contract between Duncan and Pop. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the

court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

It is also proper to rely upon the title of the act in elucidating statutory purpose. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 221 (2012) (titles and headings canon); *INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."). The CLASSICS Act stands for the Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act. and naming the legislation in this manner was a direct way for Congress to showcase its objective for the act.

As such, if this Court were to rule for anything but for retroactive application, such a holding would then go against the direct purpose of the Act and an absurd result would ensue. *See* SCALIA & GARNER, at 234 (2012) (absurdity doctrine). The Act has a clear goal of compensating aging, legacy artists who are near retirement and unable to make money from touring. S. Rep. No. 115-16, 339, at 17–18 (2018). To disregard the entire reason the CLASSICS Act was enacted and deem its application to be only prospective would mean that Pop and the thousands of artists like him would either have to fight to amend their existing contracts or hope that a new artist now decides to use their sound recording in order for them to make any money from digital streaming. As the District Court stated, "Where absurd results would follow, such a finding will not be found by the judiciary." (R. at 15).

B. Duncan's Reliance Interests are Not Unconstitutionally Undermined by Retroactive Application of the CLASSICS Act.

While some laws may have a grace period built in before it is fully enacted, there is no such required standard for Congressional legislation. In the case of the CLASSICS Act, the date it was enacted was the day its effects were intended to apply. As such, as of October 11th, 2018,

pre-1972 artists are owed royalties for digital streams of their sound recordings. Even though Duncan and Pop's contract was formed in 2015, it is Duncan's continued use of digital streams for "Fun Guy" after 2018 that now requires proper royalty payments to Pop. Duncan has argued that his reliance interest in the contract would be unconstitutionally violated by a retroactive application of the CLASSICS Act (R. at 16, 30), but federal regulation of private rights cannot be negated simply because they alter a contractual agreement. *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947) ("So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts."). Given the rational goal of closing the loophole that existed in copyright law before the CLASSICS Act, there is no doubt that such legislation was done for the common good. As stated in *Nebbia v. People of New York,* the use of property and making of contracts may be private matters and thus are generally free of government interference, "[but] neither property rights nor contract rights are absolute . . . Equally fundamental with the private right is that of the public to regulate it in the common interest." 291 U.S. 502, 523 (1934). "History reveals an unbroken congressional practice" where copyright extensions were granted to existing copyrights retroactively, with no notice given, and on the effective date of enactment despite the impact such legislation had on private parties. *See Eldred* 537 U.S. at 200; *See, e.g.*, *id*. at 237 (Stevens, J., dissenting) ("To be sure, Congress, at many times in its history, has retroactively extended the terms of existing copyrights and patents.").

Additionally, there is no evidence that the "CLASSICS Act provides remedies for Pop to deprive Duncan of the use of this music in its present form entirely." (R. at 30-31). While it is unknown to what extent Pop and Duncan attempted to renegotiate their contract after the passage

of the CLASSICS Act, it can be reasonably assumed that Pop would be willing to negotiate with Duncan given their past contract. Since private contracts can and have been altered by Congress, the claimed violation of rights that would occur if Duncan now has to pay digital streaming royalties pales in comparison to the true injustice of not properly compensating Pop.

1. Private contracts are within the domain of congressional regulation and can be altered if there is a rational basis for such impairment of expectations.

Although citizens' property rights are protected, Congress has the power to impose new constraints on the way those rights are used or to condition their continued retention on certain affirmative duties. *United States v. Locke*, 471 U.S. 84, 104 (1985). If a legitimate legislative objective is being furthered by imposing new duties or constraints upon the continued usage of the private property, then the restriction is allowable. *Id*. Due Process does not guarantee that the freedom to contract is absolute and Congress, in its constitutional right to regulate commerce, can alter private agreements if the impact is not unreasonable. *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 558 (1937); *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 307–08 (1935) ("Contracts . . . cannot fetter the constitutional authority of . . . Congress. Contracts may create rights of property, but . . . [p]arties cannot remove their transactions from the reach of dominant constitutional power . . . .").

Duncan argues that his reasonable expectations and interests in the use of "Fun Guy" and his contractual expectations for the use of "San Antonio Fever" would be "unfairly depriv[ed]" if this Court were to hold that the CLASSIC Act applies retroactively. (R at 11). However, reliance interests do not create a shield that prevents Congressional action from altering any such expectations. In *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, this Court stated, "When the contract is . . . private . . . [A] due process violation must overcome a presumption of constitutionality and 'establish that the legislature has acted in an arbitrary and

irrational way.'" 470 U.S. 451, 472 (1985) (internal citations omitted). In that case, private railroads sued on due process grounds, challenging the requirement of the Rail Passenger Service Act of 1970 (RPSA), as amended, to reimburse Amtrak. *Id*. at 458. While Congress did not specify how to calculate such costs, it did give the Interstate Commerce Commission (ICC) the power to determine the payments if Amtrak and railroads were unable to agree on price. *Id.* at 459. The ICC then set the rate of pay from 1972 to 1979. *Id*. In 1979, however, Congress decided without any notice that these payments were inadequate compensation and enacted legislation, which forced the railroads to prospectively reimburse Amtrak and at a higher rate. *Id*. While the Seventh Circuit deemed this payment scheme to have violated the Due Process Clause because the new payment requirement "unreasonably and illegally impaired the rights of the railroads under the [private contracts]," this Court held the opposite as there was no "private contractual right to not pay more" and since Congress' rationale was "neither arbitrary nor irrational," there was no due process violation. *Id.* at 464, 476-77.

In both *Na'l R. R. Passenger Corp.* and in this case, Congress enacted new legislation requiring private parties, the railroads and Duncan, respectively, to pay more than their previous contractual obligations had delineated. While Duncan and Pop may not have expected Congress to finally provide pre-1972 artists with digital streaming copyright-like protection when they had originally contracted, the same can be said of the change for the railroads and Amtrak. Just as such unexpected changes did not negate the legislation's impact on the agreement there, the same should be held here. Given the clear and reasonable congressional purpose of updating copyright law and providing monetary relief to legacy artists, no irrationality defense can be claimed. As in *Nat'l R.R. Passenger Corp.*, Duncan is not protected under the Due Process Clause from having to pay more simply because he did not envision this possibility.

2. It would not be a manifest injustice for Duncan to pay royalties.

Since a rational basis is needed for retroactive laws, notice is not necessary to prevent unfairness. *Carlton*, 512 U.S. at 34 ("[W]e do not consider . . . lack of notice . . . to be dispositive . . . In *Welch v. Henry,* the Court upheld the retroactive imposition of a tax despite . . . [no] advance notice . . . ."). However, the general trend of federal copyright law and recent technology innovation does provide some basis of notice for the CLASSICS Act. *See* Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2022) (containing all relevant Acts and amendments such as the original Copyright Act of 1976, the Copyright Renewal Act of 1992, the Sonny Bono Copyright Term Extension Act, the Digital Millennium Copyright Act, and the impact of the Berne Convention and the Uruguay Round Agreements Act); *see also R.A. Gray & Co.*, 467 U.S. at 718 ("It is doubtful that retroactive application of the MPPAA would be invalid under the Due Process Clause even if it was suddenly enacted without any period of deliberate consideration."). When the nature and identity of the parties are not changed, the overarching nature of their rights not altered, and the impact of the change is purely monetary, no manifest injustice has occurred. *See Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 717 (1974).

As Professor Brauneis writes, ". . . [I]t has been widely known that whenever Congress has extended copyright term, it has done so retroactively, granting the benefit of the extension to all works still under copyright on the effective date of the extension." *A Brief Illustrated Chronicle of Retroactive Copyright Term Extension*, 62 J. COPYRIGHT SOC'Y U.S.A 479 (2015). Thus, Duncan cannot claim to have no knowledge of the federal laws nor be ignorant about how technology and the music industry has evolved. He knew he had to sign a contract with Pop to use "San Antonio Fever," which demonstrates he understood that using the recording would not be for free. (R. at 5). Similarly, Duncan placed his music on digital streaming services because

he knew such platforms were lucrative. *See Id.* Since "Fun Guy" has become an instant hit, it has not only "played on every radio station," but also "surpassed 100 million streams on Spotify, and had a Tik-Tok dance dedicated to it." *Id*. This mainstream commercial success has been capitalized upon by Duncan, and the CLASSICS Act has set out to make sure Pop gets his fair share of money for the use of his original song. Duncan will continue to make profits off the song even while paying Pop, so neither the parties involved, nor the nature of their rights are substantially altered. The major change, which is the crux of the Act, is that Pop will now be compensated fairly for the use of his song. To hold otherwise would be a manifest injustice *not* to Duncan, but to Pop, especially since he has never been publicly credited for the use of "San Antonio Fever" and the digital streams are what catapulted Duncan into the global spotlight. *Id*.

Furthermore, within the context of copyright, this Court is not being asked to provide Pop with a novel remedy of retroactive damages. Instead, this Court should apply one of its more recent rulings to the current situation. In *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, this Court unanimously stated that "[u]pon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after registration." 139 S. Ct. 881, 886–87 (2019). There, as is occurring here, the lawsuit was for copyright infringement and involved a private contract between the two parties. Although *Fourth Est.*'s holding applies most directly to registration timing, the Court held that the remedy to be provided is from infringement onward. Duncan's illegal conduct here is quite analogous to that which took place in *Fourth Est.* as the infringement here has occurred before Pop could apply for copyright-like protections and now after he has been given such rights. Since Pop has complied with the CLASSICS Act's scheduling requirements, he is "eligible to recover statutory damages and/or attorneys' fees for the unauthorized use of Pre-1972 Sound Recordings." 17 U.S.C. § 1401(f)(5)(A). As such, this

Court's rationale in *Fourth Est.* should be applied to the current situation, which means Pop would be paid royalties starting from 2018 onward. Just as the Court did not believe such a remedy to be unjust in that case, it would not be unfair for Duncan to pay more royalties in this case.

CONCLUSION

For the foregoing reasons, Petitioner, Gregory Pop, respectfully requests that this Court reverse the decision of the Thirteenth Circuit on both questions, holding that (1) the CLASSICS Act is constitutional and Pop's work is eligible for restoration, and (2) the CLASSICS Act is to be applied retroactively and such an application does not violate Duncan's due process rights.

Applicant Details

First Name	**Rachel**
Last Name	**Schwartz**
Citizenship Status	**U. S. Citizen**
Email Address	**rs1946@georgetown.edu**
Address	**Address** Street **225 Eastern Parkway, #1C** City **Brooklyn** State/Territory **New York** Zip **11238** Country **United States**
Contact Phone Number	**9176978155**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**June 2013**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 23, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal of Legal Ethics**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Wolfman, Brian
wolfmanb@georgetown.edu
Matheny, Caitlin
cmatheny@sidley.com
212-839-5460
Super, David
das62@georgetown.edu
202 525 9132

This applicant has certified that all data entered in this profile and any application documents are true and correct.

RACHEL H. SCHWARTZ
225 Eastern Parkway #1C, Brooklyn, NY 11238 | rs1946@georgetown.edu | 917-697-8155

April 27, 2023

The Honorable Judge Kiyo A Matsumoto
U.S. District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto,

I am a 2021, *cum laude* graduate of Georgetown University Law Center with two years of litigation experience, and I am writing to apply for a term clerkship in your chambers. The years I have spent working as a litigator at Sidley Austin have given me vital experience that will make me an excellent clerk. Additionally, my five years of post-college, pre-law-school work experience; over 120 hours of pro bono legal services throughout law school; substantial experiential education almost every semester of law school I was permitted; and summer legal internships give me the professional and legal experience to be an asset to your chambers.

I have attached my resume, transcript, and writing sample. My references are:

Brian Wolfman
Georgetown University Law Center
202.661.6582
wolfmanb@georgetown.edu

Caitlin Matheny
Senior Managing Associate
Sidley Austin LLP
212.839.5460
cmatheny@sidley.com

David Super
Georgetown University Law Center
202.661.6656
david.super@law.georgetown.edu

Please let me know if I can provide additional information. Thank you for your consideration.

Respectfully,
Rachel Schwartz

Rachel H. Schwartz

225 Eastern Parkway #1C, Brooklyn, NY 11238 | rs1946@georgetown.edu | 917-697-8155

EDUCATION

Georgetown University Law Center, Washington, D.C. May 2021
J.D., *cum laude*, Special Pro Bono Pledge Recognition, Section 3
GPA: 3.65
Journal: Georgetown Journal of Legal Ethics (Executive & Submissions Editor)
Clinic: Appellate Courts Immersion Clinic (Spring 2020)
Activities: Public Interest Fellow; Jewish Law Student Association (Executive Member-at-Large); Lawcappella, A Cappella Group (Vice President; Soprano)

Northwestern University, Chicago, IL June 2013
B.A., *magna cum laude*, philosophy and psychology
GPA: 3.84
Honors: Phi Beta Kappa; Dean's List; Philosophy Honors; Brady Scholar in Ethics and Civic Life
Thesis: Philosophy, *Agreeing to Disagree: A Defense*
Awards: Weinberg Summer Research Grant, Philosophy Thesis Research; Tikvah Summer Fellow in Jewish Thought, Princeton University

EXPERIENCE

Sidley Austin LLP, Associate, New York, NY Nov. 2021–Present
- Took two and second chaired three depositions, drafted discovery demands, negotiated with opposing counsel, managed calendar for civil-rights case on behalf of prisoner held in solitary confinement for a decade
- Member of trial team for a billion-dollar, three-week trial; wrote real-time trial updates, conducted factual and legal research, prepared exhibit binders
- Researched and drafted comprehensive client memos on personal-jurisdiction, attorney-client and work-product privilege
- Drafted bankruptcy-court complaint on behalf of debtor that led to a favorable settlement

Mobilization for Justice Low Income Tax Clinic, Sidley Pro Bono Fellow, New York, NY Sept.–Nov. 2021

Sidley Austin, Summer Associate, New York, NY July 2020

ACLU, Extern, Project on Freedom of Religion and Belief, Washington, D.C. Sept.–Dec. 2019
- Conducted legal and factual research for Supreme Court briefs and other cases

The Legal Aid Society, Summer Intern, New York, NY May–Aug. 2019
- Advocated for clients from intake to judgment, preventing evictions and correcting housing violations

Rosov Consulting, Project Associate, Chicago, IL June 2016–July 2018
- Guided strategic planning for nonprofits by evaluating programs, analyzing findings, writing reports, presenting results

Interfaith Youth Core (IFYC), Campus Assessment Associate, Chicago, IL July 2013–May 2016
- Coordinated campus climate surveys, wrote reports, stewarded strategic data use on 25+ college campuses

PRO BONO AND VOLUNTEERING

Federal Public Defender for D.C., Part-Time Summer Intern, Appeals (Washington, D.C., May 2020–June 2020)
Washington Lawyers' Committee, Workers' Rights Clinic Intake Volunteer (Washington, D.C., 2019–2020)
Crisis Text Line, Volunteer Crisis Counselor (Chicago, IL, 2014–2018)
One Northside, Volunteer Mental Health Justice Organizer (Chicago, IL, 2013–2018)

Bar Admission: New York, S.D.N.Y., N.D.N.Y., 2022

Interests: Jogging, singing, windowsill gardening, vegetarian cooking

Record of: Rachel Schwartz
GUID: 828779224

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 09, 2021
Georgetown University Law Center
Major: Law
Honors: Cum Laude

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	93	Legal Process and Society Lawrence Solum	2.50	IP	0.00	
LAWJ	002	93	Bargain, Exchange & Liability David Super	3.00	IP	0.00	
LAWJ	005	30	Legal Practice: Writing and Analysis Jessica Clark	2.00	IP	0.00	
LAWJ	007	32	Property in Time Sherally Munshi	4.00	A-	14.68	
LAWJ	009	35	Legal Justice Seminar David Luban	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	7.00	7.00	24.67	3.52
Cumulative	7.00	7.00	24.67	3.52

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2019							
LAWJ	001	93	Legal Process and Society Lawrence Solum	5.00	B	15.00	
LAWJ	002	93	Bargain, Exchange and Liability Part II: Risks and Wrongs David Super	6.00	A	24.00	
LAWJ	003	93	Democracy and Coercion Allegra McLeod	4.00	A-	14.68	
LAWJ	005	30	Legal Practice: Writing and Analysis Kristen Tiscione	4.00	B+	13.32	
LAWJ	008	93	Government Processes Jonathan Molot	4.00	A-	14.68	
LAWJ	611	01	Restorative Justice Thalia Gonzalez	1.00	P	0.00	

Dean's List 2018-2019

	EHrs	QHrs	QPts	GPA
Current	24.00	23.00	81.68	3.55
Annual	31.00	30.00	106.35	3.55
Cumulative	31.00	30.00	106.35	3.55

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	1433	05	Law and Religion Stephanie Inks		NG		
LAWJ	1433	81	Law & Religion~~Sem Stephanie Inks	2.00	A-	7.34	
LAWJ	1433	82	Law & Religion~~Field Work Stephanie Inks	2.00	P	0.00	
LAWJ	1497	05	Urban Law and Policy Seminar Sheila Foster	3.00	A	12.00	
LAWJ	165	07	Evidence Gerald Fisher	4.00	A-	14.68	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	B+	13.32	
LAWJ	514	05	Introduction to Scholarly Note Writing Jessica Wherry	1.00	P	0.00	

Dean's List Fall 2019

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	47.34	3.64
Cumulative	47.00	43.00	153.69	3.57

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	049	05	Appellate Courts and Advocacy Workshop Brian Wolfman	2.00	P	0.00	
LAWJ	504	05	Appellate Courts Immersion Clinic Brian Wolfman		NG		
LAWJ	504	30	~Writing Brian Wolfman	4.00	P	0.00	
LAWJ	504	80	~Research and Analysis Brian Wolfman	4.00	P	0.00	
LAWJ	504	81	~Advocacy & Client Relations Brian Wolfman	4.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	14.00	0.00	0.00	0.00
Annual	30.00	13.00	47.34	3.64
Cumulative	61.00	43.00	153.69	3.57

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	121	07	Corporations Charles Davidow	4.00	A-	14.68	
LAWJ	1461	05	Race and Poverty in Capital and Other Criminal Cases Seminar Stephen Bright	2.00	A	8.00	
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum) Joshua Geltzer	5.00	A-	18.35	
LAWJ	1631	05	Federal Practice Seminar: Contemporary Issues Irving Gornstein	2.00	A-	7.34	
LAWJ	361	02	Professional Responsibility Peter Tague	2.00	A-	7.34	

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Rachel Schwartz
GUID: 828779224

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	55.71	3.71
Cumulative	76.00	58.00	209.40	3.61

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1322	05	Civil Rights Statutes and the Supreme Court Seminar	2.00	A-	7.34	
	Irving Gornstein						
LAWJ	135	05	Law Firm Economics and the Public Interest	1.00	P	0.00	
	Steven Schulman						
LAWJ	1512	05	Constitutional Litigation and the Executive Branch	2.00	A	8.00	
	Joshua Matz						
LAWJ	1606	08	Motherhood and the Law Seminar	2.00	A	8.00	
	Stephanie Inks						
LAWJ	1652	05	Criminal Justice II: Criminal Trials	3.00	P	0.00	
	Michael Gottesman						
LAWJ	178	09	Federal Courts and the Federal System	3.00	A	12.00	
	Kevin Arlyck						

Dean's List Spring 2021

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	9.00	35.34	3.93
Annual	28.00	24.00	91.05	3.79
Cumulative	89.00	67.00	244.74	3.65

End of Juris Doctor Record

GEORGETOWN LAW

Brian Wolfman
Professor from Practice
Director, Appellate Courts Immersion Clinic

April 14, 2023

Re: Clerkship recommendation for **Rachel Schwartz**

I recommend Rachel Schwartz to serve as a law clerk in your chambers.

I got to know Rachel in the spring semester of 2020 when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. (I'll comment on Rachel's work in the seminar toward the end of this letter.) I worked with Rachel every day for an entire semester—in-person until the Covid-19 crisis and then remotely—and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe a close associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even a few meetings, but on an intensive, day-to-day working relationship.

I'll start with my bottom line: Rachel would be an excellent law clerk. Rachel's work in the clinic was quite strong. She analyzes legal problems well. She's a very good writer and an even better editor. She's a terrific colleague too.

I'll turn now to Rachel's major clinic projects: researching and drafting both opening and reply briefs in a one federal appeal and doing the same for an answering brief in another federal appeal.

In the first case, Rachel and another student researched and drafted a brief arguing that our client's Section 1983 employment-discrimination suit (1)

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wolfmanb@law.georgetown.edu

had been adequately pleaded, and (2) was not issue-precluded by an earlier judgment. The first issue was quite difficult because the question was not whether the *factual* allegations were adequate (the typical pleading problem), but what if any obligation exists to plead the *legal* bases for one's claims. The second question—issue preclusion—was even trickier, and Rachel did a fine job researching and thinking through the difficulties of the doctrine. These were issues that law students never confront, and Rachel was called on to think a bit outside the box. She rose to the occasion. Rachel did an excellent job with the reply brief as well. She had to turn this brief around quite quickly and at the end of the semester when she was working on another opening brief and coping with the strains of virtual law practice. Yet, she did a fine job responding to our opponent's arguments without losing the basic themes we had established in our opening brief.

Rachel's second project was equally challenging. We represent a prisoner claiming that his Free Exercise rights had been violated by the prison's failure to provide religiously appropriate meals. He had successfully resisted summary judgment on the prison officials' claims of qualitied immunity. On appeal, we argued both the merits of the qualified-immunity issue and that the court of appeals lacked appellate jurisdiction over the district court's non-final order. Once again, the issues presented were not the kind normally confronted by law students in the classroom. Rachel had to learn a couple areas of the law from the ground up. Again, she did fine job, producing a brief that was analytically strong and well-written.

* * *

As noted at the top, students in my clinic are enrolled in a separately assessed seminar—the Appellate Courts and Advocacy Workshop. The first two-thirds of the course is an intensive review of federal appellate courts doctrine, including the various bases for appellate jurisdiction and the standards and scope of review. In this part of the course, the students must master the difficult doctrine and apply it in a half-dozen writing assignments that range from a motion to dismiss for lack of appellate jurisdiction to a statement of the case to a complex jurisdictional statement. We then take a short detour into Supreme Court jurisdiction and practice. Toward the end of the course, we cover a few advanced legal writing and appellate advocacy topics. Only capable students willing to work hard do well in this course. Given the course's subject matter and its blend of doctrine, writing, and practice, the course often appeals to students who desire federal judicial clerkships. Rachel's work in this class was consistently excellent. In light of Covid-19, our school switched to mandatory pass-fail grading, and so I did not grade Rachel in this

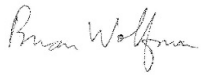
course (or in the clinic). But by the time the virus hit, and we had switched to pass-fail grading, I had assessed all but one of the seminar's writing assignments. I can tell you that the quality of Rachel's work was right at the top of the class.

* * *

Beyond Rachel's intellectual attributes, a few of her other qualities bear mention. Rachel is a serious advocate who is dedicated to her client's interests. She's honest and straightforward. She works hard. She has a lovely personality and a fine sense of humor. And, importantly, she is willing to challenge others, politely but firmly, when she believes that they need to think harder or more deeply about an issue. Not infrequently, Rachel saw problems or opportunities in cases that I or others had missed, and I appreciated her willingness to bring those things to our attention. She did this not to score points, but to ensure that we did the best job for our clients. For this reason as well, I think she'd be a fine person to have in chambers.

I'll end where I started: I recommend Rachel Schwartz for a clerkship. If you would like to talk about Rachel, please call me at 202-661-6582.

Sincerely,



Brian Wolfman

April 27, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to provide my strongest recommendation for Rachel Schwartz for a clerkship with you. I am a Senior Managing Associate at Sidley Austin LLP in the Commercial Litigation and White-Collar practice groups. I served as a Staff Law Clerk on the United States Court of Appeals for the Seventh Circuit for a two-year term. I have directly supervised Rachel on three client matters, which is effectively one-third of my work over the past year. Rachel is the best first-year associate (now second-year) that I have worked with in my over four years at the firm.

It is hard for me to put into words what makes Rachel superior, as often she does the job so effectively that she is handling the matter with little oversight from me. Rachel has all the skills that a judicial clerk should have. She researches and writes effectively, communicates complex topics in an easy-to-understand manner, has excellent time-management skills, and she is a professional who would represent the Court with integrity.

First, Rachel has an exceptional ability to write legal motions and memoranda based on the thorough legal research she conducts. This skill, alone, would be sufficient to make her stand out in your pool of applicants. But I particularly admire her ability to edit others' written work. She is excellent at reorganizing and restyling drafts she receives from others, such as those we receive from expert witnesses, more junior attorneys, or even from attorneys senior to her. Rachel's ability to understand and help clarify legal arguments would assist the Court in getting to the heart of legal issues efficiently.

Unlike many other clerkship applicants, Rachel's experience in a wide-variety of litigation matters compared with her peers has taught her how to look at litigation at a high-level and understand the complete picture. As a result, she has learned to drive case strategy, appropriately presenting and assessing the risks and benefits of a course of action. The ability to view facts and understand how they affect the entirety of a litigation often takes associates longer to grasp, but Rachel learned it right away. For example, while writing discovery requests, Rachel analyzed the claims that we will need to prove to win and determined which documents and testimony our client would need to prosecute his case. This allowed her to understand and ultimately press opposing counsel during meet-and-confer conferences for the production of documents most essential to our case, and to have the wherewithal to know which ones we could afford to compromise. She took this approach into depositions, and recently took a significant role in drafting a settlement demand. Her view of the full-scope of litigation enabled her to assess which positions we could afford to demand in settlement, and which ones we might initially include, but again, will ultimately drop.

Rachel understands how the Court's decisions affect litigants and lawyers. The practical skills I have watched her learn, that those with a strictly academic pedigree may be missing, would make her a unique asset to your chambers.

Another one of Rachel's strengths is her ability to stay calm and not become overwhelmed by new or complex tasks. For a variety of reasons, each matter that Rachel has worked on with me has been staffed leanly. This means that Rachel has had to take the first attempt at assignments that someone more senior would usually lead, or that a junior associate would do only a small part of. Rachel has always handled the assignments with ease and viewed each experience with a positive attitude, as a chance to add more litigation tools to her belt.

For example, on one matter, Rachel was tasked with hiring expert witnesses. She researched, provided recommendations to narrow the pool of expert witnesses from approximately twenty candidates, and interviewed those potential experts. The litigation team took Rachel's recommendation, and Rachel hired, and worked with the experts to write two subject-matter reports supporting our client. On the same matter, Rachel recently took depositions of two defendants. She reviewed discovery produced, wrote deposition outlines, and questioned the defendants successfully all within one month. Rachel took the depositions in a methodical fashion and was unafraid to ask tough follow-up questions to her witnesses based on newly revealed and unexpected information. In this matter, and another matter we worked on together, Rachel has led meet-and-confer conferences, each time successfully securing firm positions from opposing counsel.

Next, Rachel has better management skills than even some senior lawyers I know. I have seen her excel at delegating to other associates, paralegals, and summer associates. She is exceptional at discerning legally-imposed deadlines and then creating and managing project calendars to meet them. Rachel is also efficient in managing her own time. She prioritizes her tasks effectively, produces excellent work, and knows when the work product is finished. But where Rachel shines is in "managing up." She is unapologetic about following up, and keeping an entire matter moving. She is also unafraid to proactively give and solicit feedback, which makes her own work, and the work of everyone around her, better. Rachel is in her second-year as an attorney and I think she is better at this than I am, and I have been practicing for seven years.

I would also like to highlight Rachel's intellectual curiosity, love of the law, and integrity. She goes above and beyond on any research assignment, not only answering the question asked but seeing the holes in an argument, or predicting the next

Caitlin Matheny - cmatheny@sidley.com - 212-839-5460

questions, and providing an answer for those, too. Rachel genuinely delights in finding the answers to complex legal issues across subject areas, and she is excellent at it.

Last, Rachel sticks to deadlines, keeps her promises, communicates before deadlines if she thinks more time would be beneficial to the work product while still keeping the matter on track, and I trust her without fail. In short, she would represent the Court with integrity. I know that if Rachel gives me work product, I need not check whether her statements or research is accurate (although I do).

For all these reasons, it would be bittersweet for me, and our firm, to lose Rachel, even if temporarily, to a clerkship. Rachel makes me a better lawyer, and I strongly recommend her for a clerkship with you.

Kind regards,

Caitlin Matheny

Caitlin Matheny - cmatheny@sidley.com - 212-839-5460

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

September 2022

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am most happy to recommend Rachel Schwartz for a clerkship in your chambers. She was a bright, accomplished and hard-working student, she is proving an engaged, energetic lawyer, and she will make an excellent law clerk.

I came to know Ms. Schwartz because she enrolled in the year-long course I teach in Georgetown's alternative curriculum that combines Contracts and Torts. This is a demanding and sometimes disorienting program, organized quite differently from the way either course is taught on its own. Even many students that eventually do quite well struggle mightily in the beginning. Not Ms. Schwartz. She had the intellectual ability to handle everything that the course threw at her and the commitment to hard work to give meticulous attention to the heavy readings assigned. The organization of this course diverges from those of standard Contracts and Torts courses to the point that commercial outlines are of little value to students; Ms. Schwartz is such a dedicated student that I doubt she would have bothered with one anyway.

I gave exams at the end of each semester. Many students' performance varies consider-ably from one to the other. Again, Ms. Schwartz was the conspicuous exception, writing stand-out responses to both. I am sure I could have made the exams twice as difficult and it would not have phased her in the least.

Although Ms. Schwartz in no way neglected her coursework, even in her first year she was developing much broader interests in the law. In particular, she was interested in the intersection between public and private regulation, a timely topic on which I have written as well. With my encouragement, she made several appointments to discuss how our system allocates responsibilities between Tort and various regulatory regimes. Whenever I would mention a case or article, even casually, she would invariably have read it by our next meeting and formed a nuanced opinion about it. Having such sophisticated conversations with a graduating third-year student would have been impressive; doing so with a first-year student was remarkable. We continued to talk throughout her law school career; she sought my comments on a fascinating note she wrote on how landlord-tenant law, various municipal ordinances, and conditions on federal funding shape housing quality in New York City.

I have stayed in touch with Ms. Schwartz occasionally since her graduation. I am most impressed with how enthusiastically she has taken to litigation. She takes her duties to her clients and to the courts very seriously and so conveys few details, but she clearly is fascinated by the process and relishing being a part of it. This enthusiasm and curiosity will make her a superb clerk even when the tasks at hand might strike some as less than scintillating.

More broadly, Ms. Schwartz has all the skills required to be an excellent law clerk. She is a strong writer, she has superior legal research skills, she is a hard worker and imposes higher standards on her own work than any supervisor would ever impose on her. She reacts positively to criticism and disagreement. She has impressive maturity, poise, and self-confidence without allowing her considerable talents to kindle any arrogance or carelessness. And she is a courteous and pleasant human being. I expect your staff will enjoy having her in chambers.

In sum, Rachel Schwartz is an impressively talented, hard-working, and quite adaptable lawyer. She will excel as a law clerk and give all of her mentors numerous occasions for pride as she sets out on a most promising legal career. Her applications has my full and unreserved support.

Sincerely yours,

David A. Super
Carmack Waterhouse Professor of Law and Economics

David Super - das62@georgetown.edu - 202 525 9132

RACHEL H. SCHWARTZ
225 Eastern Parkway #1C, Brooklyn, NY 11238 | rs1946@georgetown.edu | 917-697-8155

Writing Sample

The attached writing sample is a Motion to Dismiss I wrote for a seminar called *Appellate Courts and Advocacy Workshop*. Based on only the limited set of caselaw given to us, we were assigned to examine whether the Sixth Circuit had jurisdiction to hear the appeal of a decision refusing to certify a class settlement. I argued on behalf of the Intervenors-Appellees that it did not.

The Motion is my own work. I wrote it independently after class discussions of Supreme Court caselaw about appellate jurisdiction under 28 U.S.C. §§ 1291-1292. The only feedback I got on it included one round of light margin-comments from my professor after I submitted it. I edited the Motion based on those comments and my own judgment with no help from others.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Polly Shipler; Billy Andrews; Walter Wong; Rita Jones; and all others similarly situated, Plaintiffs-Appellants, v. Cardio Products, Inc., Defendants-Appellants Grace Brown; Sheila Piercy; Marge Millett; George Wideman; and John Will, Intervenors/Class Members-Appellees.	No. XXXX Hon. XXXX, J.

Intervenors-Appellees' Motion to Dismiss

Twenty-nine-thousand recipients of pacemakers manufactured by Cardio Products, Inc. sued Cardio for damages because its pacemakers were dangerously defective. A few months later the parties reached a settlement, but the district court found it inadequate and refused to approve it. Cardio and the class of pacemaker recipients appealed the district court's denial of their settlement, but several class members, Intervenors-Appellees Grace Brown, Sheila Piercy, Marge Millett, George Wideman, and John Will, now move to dismiss this appeal for lack of appellate jurisdiction.

This Court should grant the class members' motion and find appellate jurisdiction lacking because the district court's decision does not conclusively resolve an issue that is

separate from the merits of the action, and it is effectively reviewable on appeal from a final judgment.

Factual and procedural background

Most people who have pacemakers undergo surgery every three years to replace a part of the device called the pulse generator. R. at 239 (Mem. Op. and Order 239). Cardio Products, Inc. marketed a new kind of pacemaker, advertising that its pulse generator would need to be replaced only every fifteen years. *Id.* For the convenience and savings in medical care its updated model would afford, Cardio charged ten times more money than most other models cost. *Id.* at 240 (Mem. Op. and Order 240).

As has now been established, Cardio's claim was far from true; its pacemakers provided no advantage over existing models. *Id.* Cardio's false advertising was discovered only once a series of pacemaker failures resulted in emergency surgeries and even death. *Id.* These emergencies prompted a change in protocol for recipients of Cardio's pacemaker, requiring yet unharmed recipients to undergo pacemaker upkeep surgery every three years—the same frequency as those with other types of pacemakers, and five times as often as they bargained for. *Id.*

In August of 2016, 29,000 Cardio pacemaker recipients filed a class complaint seeking three things: reimbursement for the difference in price between what they paid for the pacemaker and what they would have paid if its marketing had accurately reflected its capabilities; reimbursement for future medical care; and pain and suffering. *Id.* The class also

sought punitive damages on the grounds that Cardio knew or should have known that its pacemaker would not last more than three years and because it used false data to trick the FDA into approving it. *Id.* at 240-41 (Mem. Op. and Order 240-41).

Only four months later, on December 1, 2016, and after only minimal discovery the parties reached a proposed settlement that included a shadow of what the class sought in its complaint—that Cardio would pay for future medical care associated with replacing pacemaker devices. *See id.* at 241 (Mem. Op. and Order 241). Still, the district court preliminarily approved it and certified the class for settlement purposes only. *Id.*

About 300 class members timely filed written objections to the fairness of the settlement. *Id.* at 241-42 (Mem. Op. and Order 241-42). At the hearing, the class members argued that the settlement was unfair for two reasons: First, they argued it was unfair because two of the three pacemaker-related cases that had been tried to verdict against Cardio resulted in verdicts for over three million dollars including lost wages and punitive damages in addition to the cost of future medical care. *Id.* at 242 (Mem. Op. and Order 242). Second, they argued it was unfair to California residents, where about twenty percent of the class lives, because a California state court had overruled all of Cardio's legal defenses. *Id.*

In response, Cardio argued that its statute of limitations defense had been successful in two states and that the settlement provided sufficient prospective damages. *Id.* Class counsel responded by arguing on the one hand that the settlement adequately compensated members for emotional distress by easing their worry about medical expenses. *Id.* On the other hand, it argued that even though the settlement was inadequate as to some class members, the

settlement was a good compromise because it would achieve the greatest good for the greatest number of class members. *Id.*

On August 7, 2017, the district court denied class counsel and Cardio's motion to approve the settlement, holding that the relative strength of the parties' positions on the merits demonstrated that the settlement was not "fair, adequate, and reasonable." *Id.* at 242-43 (Mem. Op. and Order 242-43). Because most class members are elderly, the court observed, the cost of future medical care would not sufficiently compensate them for the years of unbargained-for pain as a result of buying a product that fell short of its description. *Id.* As for younger class members who are still working, the settlement would not compensate them for lost wages and other consequential damages. *Id.* at 243 (Mem. Op. and Order 243). Finally, the court took issue with the fact that the settlement provided no damages whatsoever, either compensatory or punitive. *Id.* The court decertified the settlement class and set a schedule to move toward trial. *Id.* Cardio and class counsel timely appealed. *Id.* at 245 (Mem. Op. and Order 245).

Argument

I. This Court should dismiss this appeal for lack of jurisdiction because the district court's refusal to approve the class settlement is not appealable as a collateral order.

Because the district court's refusal to certify the class settlement does not end the action for any party and does not meet the criteria for interlocutory appeal under 28 U.S.C. §§ 1292, the most plausible ground on which this Court could find jurisdiction is the final

judgment rule of 28 U.S.C. § 1291 and the collateral order doctrine. *Cohen v. Beneficial Indus. Loan, Corp.*, 337 U.S. 541, 546-47 (1949); *Wedding v. Univ. of Toledo*, 89 F.3d 316, 318 (6th Cir. 1996). The collateral order doctrine interprets the final judgment rule to mean that on rare occasions appellate courts have jurisdiction over appeals of important decisions that, though they do not end the action, are separate from the merits of the action and would not be effectively reviewable on appeal from a final judgment. *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Cohen*, 337 U.S. at 546.

This Court has understood there to be three elements to the collateral order doctrine. *Wedding*, 89 F.3d at 318-19 (quoting *Johnson v. Jones*, 515 U.S. 304, 310 (1995)). The appealed order must (1) be conclusive, (2) resolve an issue that is separate from the case's merits, and (3) be unreviewable on appeal from a final judgment. *Id.* Whether these elements apply to the resolution of a particular claim is irrelevant in the inquiry of whether an order is a collateral order; what matters is whether these elements apply to the category of claims to which it belongs. *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999); *Dig. Equip.*, 511 U.S. at 868. Because there is only one relevant and controlling case in the Sixth Circuit [for the purposes of this class assignment], Supreme Court and other circuits' precedent is instructive in applying these factors.

1. The district court's order is not conclusive.

To be conclusive, an order must be the final word on the subject addressed, eliminating the possibility that the district court will alter its conclusion in subsequent proceedings.

Mitchell v. Forsyth, 472 U.S. 511, 527 (1985); *Wedding*, 89 F.3d at 318 (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988)). Disapproval of a settlement that, if approved, would have resulted in a final judgment is the quintessential non-conclusive order. *See Seigal v. Merrick*, 590 F.2d 35, 38 (2d Cir. 1978). *Seigal*, like this case, concerns the appeal of a district court's order refusing to certify a settlement. 590 F.2d at 36. There, the Second Circuit held that refusing to certify a settlement is not an appealable collateral order because, by definition, it is not conclusive as to whether the court will allow the parties to settle—the parties will have countless opportunities to settle as litigation moves forward. *See id.* at 37-38. And that is exactly what happened; the parties agreed on an amended stipulation while appeal was pending. *Id.* at 39. Here, like in *Seigal*, Cardio and the class will have opportunities to amend their settlement and continue negotiating an agreement as trial proceeds.

Though the district court's decision is conclusive as to the *particular* settlement, *see Seigal*, 590 F.2d at 38, there is nothing stopping the parties from advancing a settlement later in litigation with the exact same terms. The district court may yet alter its conclusion and approve the settlement's terms if, for example, over the course of litigation it becomes clear that Cardio has a stronger case than it currently seems. All the district court has decided is that, given the information currently available, the settlement was not "fair, adequate, and reasonable"; it has not foreclosed the possibility that the settlement may be considered fair in light of facts that surface as trial proceeds. R. 242 (Mem. Op. and Order 242 (citing Fed. R. Civ. P. 23(e)(2))). Just the opposite—in setting a schedule to move the case toward trial,

the court opened itself up to this exact possibility. That the district court may issue an opinion later in the regular course of this litigation approving exactly what it just denied undermines the denial's conclusiveness.

2. The district court's order is not separate from the action's merits.

To be separate from the merits of an action, an order must be "conceptually distinct from the merits" of the parties' claims. *Mitchell*, 472 U.S. at 527-28. In contrast, an order that is "inextricably intertwined with the merits of the action" because the court considers the accuracy of any facts or the sufficiency of any pleadings in its analysis of the order is not appealable as a collateral order. *Cunningham*, 527 U.S. at 205.

Though the district court said that "it is not appropriate for a court to make determinations on the merits of the class claims in deciding whether to approve a class-action settlement," it nevertheless did a merits inquiry. R. 243 (Mem. Op. and Order 243). It evaluated the "relative strength of the parties' positions *on the merits*" to determine that the "settlement is not fair, adequate, and reasonable." *Id.* (emphasis added). While neither side advanced many disputed facts, the court went on to evaluate the adequacy of Cardio's and the class's responses to intervenors' objections that, for example, "this settlement does the most good for the most people" or "effectively compensates the class members for emotional distress." *Id.* at 242 (Mem. Op. and Order 242).

And the district court's merits inquiry was inevitable. "[A]n order disapproving a settlement" in a class action is, by its very nature based "upon an assessment of the merits of

the positions of the respective parties." *Seigal*, 590 F.2d at 37 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)).

Though the Ninth Circuit has maintained that it is possible to evaluate the fairness of a class settlement without a merits analysis by simply balancing "what plaintiffs sought in their complaint and what the settlement provided," *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970), this analysis of a settlement's fairness would be inadequate. For example, if there is a mismatch between the severity of the complaint's allegations and the quality of the settlement terms, but the complaint is overambitious and unlikely to succeed, the settlement might still be fair. Without looking at likelihood of success on the merits, a court would be at risk of erroneously determining a settlement as fair or unfair.

3. The district court's order is reviewable on appeal of a final judgment.

To be reviewable on appeal of a final judgment, moving toward trial must not irreparably deprive a litigant of rights that cannot effectively be vindicated after trial has occurred. *Mitchell*, 472 U.S. at 525; *Cohen*, 337 U.S. at 546; *Wedding*, 89 F.3d at 319. The unvindicatable rights that a collateral order must deny to be immediately appealable include chiefly immunities from suit, *Will v. Hallock*, 546 U.S. 345, 350 (2006) (citing *Mitchell*, 472 U.S. at 530 (qualified immunity); *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993) (Eleventh Amendment immunity); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (absolute immunity); *Abney v. United States*, 431 U.S. 651, 660 (1977) (double jeopardy)), the denial of which "would imperil a substantial public interest." *Will*, 546 U.S.

at 353 (citing *Coopers & Lybrand*, 437 U.S. at 468). Because "almost any pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewriting history," a simple determination of whether an order concerns an immunity from suit is insufficient. *Dig. Equip.*, 511 U.S. at 872. Instead, a determination of whether the immunity from suit implicates a "value of a high order" is the only thing "that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *See Will*, 546 U.S. at 353 (citing *Coopers & Lybrand*, 437 U.S. at 468).

While Cardio and class members may construe their settlement as granting them immunity from trial, the district court's "denying effect to [the class] settlement agreement does not come within the narrow ambit of collateral orders." *See Dig. Equip.*, 511 U.S. at 865. In *Digital*, Desktop Direct moved to rescind a settlement agreement because of Digital's misrepresentation during negotiations. *Id.* at 866. The district court granted this motion, and Digital appealed. *Id.* The Supreme Court held that Digital's appeal could not be heard because "rights under private settlement agreements can be adequately vindicated on appeal from final judgment." *Id.* at 869. Separately, the Court also held that securing an immunity from trial, of sorts, by agreeing to a settlement "does not rise to the level of importance needed" to be appealable as a collateral order. *Id.* at 877-78.

All that can be construed in this case as securing an immunity from standing trial is the settlement agreement. *See* R. 239 (Mem. Op. and Order 239). But, first, like in *Digital*, because Cardio and class members' immunity from trial comes from their private settlement, it is not important enough to be appealable as a collateral order. *See Dig. Equip.*, 511 U.S. at

877-78. And, second, as a settlement agreement that includes only monetary payment, the rights in the settlement could be adequately vindicated on appeal from a final judgment simply by retroactive reimbursement. *See* R. 241 (Mem. Op. and Order 241). The class members who, without the settlement, will have to pay their own medical bills could be made whole if they win at trial and are simply awarded damages.

Conclusion

For the foregoing reasons, this Court should dismiss this appeal for lack of jurisdiction.

Dated: October X, 20XX

Respectfully Submitted,

/s/Rachel Schwartz
Counsel for Intervenors

Applicant Details

First Name	**Christopher**
Last Name	**Scott**
Citizenship Status	**U. S. Citizen**
Email Address	**cscott@jd23.law.harvard.edu**
Address	**Address** **Street** **29 Montrose Ave., Apt. 3A** **City** **Brooklyn** **State/Territory** **New York** **Zip** **11206** **Country** **United States**
Contact Phone Number	**6368754442**

Applicant Education

BA/BS From	**The University of British Columbia, Canada**
Date of BA/BS	**November 2017**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 26, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Civil Rights - Civil Liberties Law Review** **Harvard Business Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Ames Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Klein, Alexandra
aklein1@stmarytx.edu
210-431-8056
Goldsmith, Jack
jgoldsmith@law.harvard.edu
617-384-8159
Forton, Kenneth
ken.forton@mass.gov
617-276-2821

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Christopher Scott
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May 28, 2023

The Honorable Kiyo A. Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to express my interest in a clerkship in your chambers beginning in 2025. I recently graduated from Harvard Law School and have accepted an offer to join the New York office of Gibson, Dunn & Crutcher this fall.

As you can see from my materials, I will bring research, writing, and editing experience to this role. While at Harvard, I served as a Lead Article Editor on the *Harvard Civil Rights-Civil Liberties Law Review* and the editor of *Harvard Business Law Review*'s student blog. I also sharpened my judicial research and writing skills while interning at the Massachusetts Division of Administrative Law Appeals and the Supreme Court of Virginia's Office of the Chief Staff Attorney. I will continue to improve these skills over the summer following law school as a research assistant to Climenko Fellow Andrea Olson for her upcoming article on federal equity.

Before law school, I developed strong time management and organizational skills while working as a project coordinator and legal assistant. I also had the pleasure of serving as a Community Economic Development Volunteer with the Peace Corps in Peru.

Attached are my resume, academic transcripts, and writing sample. The following individuals will send letters of recommendation separately on my behalf:

Prof. Jack Goldsmith
Harvard Law School
jgoldsmith@law.harvard.edu
(617) 384-8159

Prof. Alexandra Klein
St. Mary's School of Law
aklein1@stmarytx.edu
(210) 431-8056

Mag. Kenneth Forton
Massachusetts Division of
Administrative Law Appeals
ken.forton@mass.gov
(781) 397-4700

Thank you for your consideration.

Sincerely,

Christopher Scott

Enclosures

Christopher Scott

29 Montrose Ave. 3A, Brooklyn, NY 11206
cscott@jd23.law.harvard.edu • (636) 875-4442

EDUCATION

Harvard Law School, Cambridge, MA
J.D., May 2023 (*Transferred from Washington & Lee University School of Law*)
Activities: *Harvard Civil Rights-Civil Liberties Law Review*, Lead Article Editor
Harvard Business Law Review, Current Accounts Editor
Andrea Olson (Climenko Fellow and Lecturer on Law), Research Assistant (Summer 2023)
Ames Moot Court Competition (Top 16 teams)
First Class; Lambda

University of British Columbia, Vancouver, BC
B.A., November 2017 (*Transferred from Seton Hall University*)

EXPERIENCE

Gibson, Dunn & Crutcher, New York, NY
Associate (Expected), September 2023
Summer Associate, May – July 2022

- Researched and wrote memoranda on issues involving due process, standing, and equitable tolling
- Reviewed arbitral record to highlight facts relevant to enforcement proceedings in federal district court
- Examined client records and prepared presentation for U.S. Department of Justice

Massachusetts Division of Administrative Law Appeals, Malden, MA
Intern, September – November 2022

- Attended hearings, reviewed party submissions, and drafted decisions

Melchionna PLLC, New York, NY
Summer Associate, June – July 2021
Legal Assistant, April 2019 – August 2020

- Introduced licensing and tax obligations management system, ensuring client met monthly filing deadlines in 25+ jurisdictions
- Wrote blog posts on new legislation/regulations to inform clients of industry developments
- Drafted, proofread, and translated correspondence with government agencies

Supreme Court of Virginia, Office of the Chief Staff Attorney, Richmond, VA
Intern, May – June 2021

- Analyzed trial court records and drafted objective memoranda analyzing criminal appeals
- Researched criminal code changes and assembled report that will assist staff attorneys with future appeals

Be More, Inc., New York, NY
Project Coordinator, October 2018 – April 2019

- Deployed implicit bias survey at major regional hospital and analyzed results to create mobile application-based implicit bias training curriculum
- Launched company's phone service, data management system, and project management tool

Peace Corps, Villa Rica, Peru
Business Development Volunteer, March – August 2018

- Taught 6-week program to improve local English teachers' language skills
- Facilitated 20 entrepreneurship and financial education workshops to empower rural business owners

INTERESTS

- Commissioner, Harvard Graduate Intramural Sports Committee
- Urban design & public transportation
- Foreign languages (intermediate proficiency in Spanish and Italian)

Harvard Law School

Date of Issue: May 26, 2023
Not valid unless signed and sealed
Page 1 / 1

Record of: Christopher Andrew Scott
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023
Pro Bono Requirement Complete

JD Program

First year completed at Washington and Lee University.

Fall 2021 Term: September 01 - December 03

2000	Administrative Law Freeman, Jody	P	4
2048	Corporations Spamann, Holger	P	4
2146	Law and Economics Kaplow, Louis	H	2
2219	Regulation of Financial Institutions Jackson, Howell	P	4

Fall 2021 Total Credits: 14

Winter 2022 Term: January 04 - January 21

2050	Criminal Procedure: Investigations Seo, Sarah	P	3

Winter 2022 Total Credits: 3

Spring 2022 Term: February 01 - May 13

2086	Federal Courts and the Federal System Fallon, Richard	P	5
8035	Predatory Lending and Consumer Protection Clinic Bertling, Roger	H	4
2204	Predatory Lending and Consumer Protection Clinical Seminar Bertling, Roger	H	2

Spring 2022 Total Credits: 11
Total 2021-2022 Credits: 28

Fall 2022 Term: September 01 - December 31

3145	Advanced Topics in Federal Courts Goldsmith, Jack	H	2
2079	Evidence Schulman, Emily	P	4
8099	Independent Clinical - Massachusetts Division of Administrative Law Appeals Gregory, Michael	CR	3
3141	The Judicial Role in a Democracy Abella, Rosalie Silberman	H	2
3202	The United States Supreme Court Sunstein, Cass	H	2

Fall 2022 Total Credits: 13

Winter 2023 Term: January 01 - January 31

7000W	Independent Writing Goldsmith, Jack	H	2

Winter 2023 Total Credits: 2

Spring 2023 Term: February 01 - May 31

2173	Advanced Legal Research Kennedy, Jocelyn	H	2
2007	Antitrust Law Kaplow, Louis	P	4
2809	Forced Arbitration and the American Civil Justice System Gupta, Deepak	H	2
2169	Legal Profession Okediji, Ruth * Dean's Scholar Prize	H*	3

Spring 2023 Total Credits: 11
Total 2022-2023 Credits: 26
Total JD Program Credits: 54

End of official record

Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
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Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

Print Date: 05/17/2023
Page: 1 of 1
Student: Christopher Scott

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

SSN:	XXX-XX-9891	**Entry Date:**	08/17/2020
Date of Birth:	05/26/XXXX	**Academic Level:**	Law

2020-2021 Law Fall
08/17/2020 - 11/24/2020

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	A	4.00	4.00	16.00	
LAW 140	CONTRACTS	A	4.00	4.00	16.00	
LAW 163	LEGAL RESEARCH	A	0.50	0.50	2.00	
LAW 165	LEGAL WRITING I	A	2.00	2.00	8.00	
LAW 190	TORTS	A	4.00	4.00	16.00	
	Term GPA: 4.000	**Totals:**	14.50	14.50	58.00	
	Cumulative GPA: 4.000	**Totals:**	14.50	14.50	58.00	

2020-2021 Law Spring
01/11/2021 - 04/27/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	A-	4.00	4.00	14.68	
LAW 150	CRIMINAL LAW	A	3.00	3.00	12.00	
LAW 163	LEGAL RESEARCH	A	0.50	0.50	2.00	
LAW 166	LEGAL WRITING II	A	2.00	2.00	8.00	
LAW 179	PROPERTY	A	4.00	4.00	16.00	
LAW 195	TRANSNATIONAL LAW	A	3.00	3.00	12.00	
	Term GPA: 3.920	**Totals:**	16.50	16.50	64.68	
	Cumulative GPA: 3.957	**Totals:**	31.00	31.00	122.68	

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	31.00	31.00	3.957
External:	0.00	0.00	
Overall:	31.00	31.00	3.957

Program: Law

End of Official Transcript

WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.
The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.
The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

Official transcripts, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

Undergraduate

Degrees awarded: Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commence (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	4.33 prior to Fall 2009
A	4.00	Superior.
A-	3.67	
B+	3.33	
B	3.00	Good.
B-	2.67	
C+	2.33	
C	2.00	Fair.
C-	1.67	
D+	1.33	
D	1.00	Marginal.
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

Grade prefixes:

R Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).

E Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

Ungraded credit:

Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.

Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

Cumulative Adjustments:

Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

Dean's List: Full-time students with a fall or winter term GPA of at least 3.400 *and* a cumulative GPA of at least 2.000 *and* no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

Honor Roll: Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

University Scholars: This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

Law

Degrees awarded: Juris Doctor (JD) and Master of Laws (LLM)

Numerical Grade*	Letter Grade**	Points	Description
4.0	A	4.00	
	A-	3.67	
3.5		3.50	
	B+	3.33	
3.0	B	3.00	
	B-	2.67	
2.5		2.50	
	C+	2.33	
2.0	C	2.00	
	C-	1.67	
1.5		1.50	This grade eliminated after Class of 1990.
	D+	1.33	
1.0	D	1.00	A grade of D or higher in each required course is necessary for graduation.
	D-	0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5		0.50	This grade eliminated after the Class of 1990.
0.0	F	0.00	Receipt of D- or F in a required course mandates repeating the course.

Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.
** Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

Cumulative Adjustments:

Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

Course Numbering Update: Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar
Washington and Lee University
Lexington, Virginia 24450-2116
phone: 540.458.8455
email: registrar@wlu.edu

University Registrar

220707

May 31, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Chris Scott for a judicial clerkship in your chambers. I've known Chris since he was a first-year law student at Washington & Lee University School of Law. At the time, I was employed as a Visiting Assistant Professor at W&L Law. I have since accepted a position as an Assistant Professor of Law at St. Mary's University School of Law. Although Chris transferred to Harvard Law after his first year at W&L Law, he and I stayed in touch. I think Chris would make an excellent law clerk for the reasons discussed below.

I had the pleasure of teaching Chris in Constitutional Law. That particular group of 1Ls was a lively and talented group, but Chris stood out fairly early in the semester for his meticulous class preparation, active participation, intelligence, and the accuracy and thoughtfulness with which he approached class discussion. I was particularly impressed by Chris's assessment and discussion of The Slaughter-House Cases. He understood the ruling well and asked probing questions about the Privileges and Immunities Clause of the Fourteenth Amendment. Chris was fun to teach because he is a genuinely curious person and he had a real appreciation of the logic in judicial reasoning. Chris's ability to unpack the logical steps in judicial opinions consistently enhanced class discussion. I also appreciated Chris's thoughtful nature when we discussed complex topics in Constitutional Law. Students frequently disagree about certain topics and the application of legal doctrines. Chris was respectful of colleagues' differing points of view, but he also didn't hesitate to persuasively argue his own perspectives, usually with accurate reference to legal principles.

I came to know Chris better through his regular visits to my office hours, where we had further in-depth discussion of course topics as well as their broader applications. Chris had a special interest in the historical context of constitutional law topics and he had read widely in the subject area. He seems to be a natural academic. Chris received an A- in Constitutional Law. Although most students would have been delighted with that grade, Chris sought feedback on his performance and areas of improvement. This was not a meeting in which Chris wanted praise for how well he had done. Instead, Chris wanted to know how to make his legal analysis even better. He has a high personal standard and was happy to receive constructive feedback to improve his performance.

I admit that I was disappointed when I learned that Chris was transferring to Harvard. He had been a fantastic student and I thought that he was a real asset to the W&L Law community. I had also hoped to hire him as a research assistant. I was confident, however, that Chris would continue to be successful wherever he attended law school. I was pleased to learn about Chris's participation with the Harvard Civil Rights–Civil Liberties Law Review and the Harvard Business Law Review. I had encouraged Chris to write on to the Washington and Lee Law Review, which he successfully did in a competitive process that factored in grades, writing skill, and Bluebooking before he decided to transfer.

From our conversations, it is evident how much Chris enjoys legal writing and research. He was particularly interested in understanding and tracing how legal doctrines develop. Chris is the sort of person who will thrive in a research and writing-oriented environment. He has strong personal discipline and is very much a self-starter. During our class discussions, I was impressed by Chris's commitment to clear legal reasoning and the dignity of all people before a court. He wanted to understand the practical implications of the decisions we discussed in Constitutional Law and how they would impact people's lives.

Chris has displayed outstanding professionalism and trustworthiness during all of our interactions. He is also a kind and thoughtful person. When I accepted the position at St. Mary's, Chris took the time to write me a very thoughtful congratulatory note even though he was no longer one of my current students—or even enrolled at W&L Law. I have heard similar anecdotes from his former classmates at W&L Law, who expressed how much they would miss him after he transferred. I'm also aware that Chris had served as a resource for other students who considered transferring to discuss his experience and offer guidance.

Chris was a pleasure to teach and I am thrilled that he's joining the legal profession. I'm extremely proud of everything that he's accomplished and I look forward to seeing everything he will accomplish. Please feel free to contact me at any time at 540-294-6552, 210-431-8056, or aklein1@stmarytx.edu if you have any questions or if there is any other information I can provide about Chris.

Sincerely,

Alexandra Klein
Assistant Professor of Law

May 30, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Chris Scott for a clerkship in your chambers.

Chris did his first law school year at Washington & Lee, where he got all As and was invited to join the Washington and Lee Law Review. At Harvard he has a basically even split of Hs and Ps. And he served as the Lead Article Editor of the Harvard Civil Rights-Civil Liberties Law Review.

One of the Hs was in my Advanced Federal Courts seminar, which is where I got to know him. He was outstanding in the seminar. He wrote eight excellent essays on very complex federal courts doctrine issues related to Erie and federal common law. He writes clearly and has a mastery of federal courts doctrine. And he is unusually thoughtful in taking a non-dogmatic approach to legal issues and following where the evidence and legal logic lead him. Chris also wrote a truly outstanding paper on the topic of how Erie issues operate in other federal systems outside the United States. The paper displayed a deep knowledge of Erie and related doctrines, and a surprising grasp of federal systems in Germany, Canada, and Australia. The paper was, like his seminar essays, beautifully written. And it showed great skill in making complex foreign procedural systems accessible and in comparing them to the U.S. system. I learned an unusual amount from the paper.

Chris will make an outstanding law clerk. He loves hard legal problems and he is great at breaking them down and analyzing them. In the seminar he showed that he listened well and engaged respectfully and constructively with others' arguments. He is a lovely young man—respectful, polite, genuinely curious, and empathetic. And he will come to you with significant litigation experience at Gibson Dunn under his belt.

Please contact me if you have questions.

Sincerely,

Jack L. Goldsmith

Jack Goldsmith - jgoldsmith@law.harvard.edu - 617-384-8159

9 June 2023

re: *Recommendation for Christopher Scott*

Dear Judge:

I am writing on behalf of Christopher Scott, who is seeking a clerkship with you beginning in Fall 2024. I have known Chris for about a year now. He was a Fall 2022 intern for me at the Massachusetts Division of Administrative Law Appeals (DALA), where I have been an administrative magistrate for 15 years. I have been in charge of interns for our agency for the past 12 years. Chris ranks in the top 5% of the approximately 120 interns that I have supervised.

When I assign work to new interns, I usually start with a fairly straightforward assignment to help me gauge whether they are able to move on to something more challenging. Chris moved through that first assignment so quickly that I did not have a chance to prepare a second assignment yet. This set a theme for the term: keep up with Chris. (At this point, I should mention that interns are an integral part of our production line. With uncertain state budgets, etc. a competent intern can make a serious contribution to our work.) Our interns almost exclusively write whole decision drafts. Usually, the first draft requires a significant amount of editing and even re-writing. I was surprised after reviewing Chris's drafts because they did not require much editing and certainly no wholesale rewriting. For the rest of the term, I felt confident when Christ handed me a draft. He was productive, as well: 6 decision drafts while working only 10 hours per week for the Fall term.

Despite our name, which has "appeals" in it, we conduct *de novo* administrative hearings. This can be difficult for interns to wrap their heads around. They do not understand at first that our agency makes findings of fact. Perhaps this is because facts are always a given in law school. Little, if anything, is said outside of evidence class how facts are generated in our legal process. Drafting findings of fact is confounding for many interns. They fail to synthesize the testimony and the documents. They can't make choices among the bits of evidence based on the magistrates' initial conferences. Chris had no trouble with this. He was able to chew through three inches of exhibits and testimony in no time.

You can see that Chris's resume is impressive, but a few things stand out to me. First, he strives for excellence. For both his undergrad and law school, he transferred to better schools after he proved himself at his initial choices. Second, he goes where the opportunity is. His schooling has taken him to New Jersey, British Columbia, Virginia, and Massachusetts. His work experience is largely in New York, but he challenged himself with the Peace Corps in Peru. Third, Chris has significant writing experience already, at the *Harvard Civil Rights-Civil Liberties Law Review*, the *Harvard Business Law Review*, and his various work experiences.

I know this fall he is headed to Gibson, Dunn & Crutcher, but I am curious where he ends up afterward. I say that because I can see that he ultimately wants to use his degree for some public good, as well. His experience in the Peace Corps and concerns with bias and urban design and public transportation tell me he will spend at least part of his career in public service.

Finally, I had the opportunity to get to know Chris personally and socially, as we ate lunch together when he was in the office. He is genuine and real. I can tell that he will take his obligations as an attorney seriously.

If you have any questions, please contact me at ken.forton@mass.gov, or call me at (781) 397-4724.

Sincerely,

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

Christopher Scott
29 Montrose Ave. 3A, Brooklyn, NY 11206
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WRITING SAMPLE

Drafted Spring 2023

This writing sample is an excerpt from a 48-page independent writing project I completed under the supervision of Professor Jack Goldsmith. Because of its length, certain sections are omitted. What remains below is representative of my analysis, although some writing may allude to sections of the paper that do not appear here. A full copy of this paper is available upon request.

This document is entirely my own work product.

ERIE THROUGH A COMPARATIVE LENS: WHAT CAN THE UNITED STATES LEARN FROM THE EXPERIENCE OF OTHER FEDERAL SYSTEMS?

The constitutional rule enunciated in *Erie Railroad Co. v. Tompkins*[1] remains a source of great frustration for scholars, judges, and law students alike. It is simple enough to say that federal courts sitting in diversity must follow federal procedural law and state substantive law, but it is another entirely to draw the line between substance and procedure in practice. This difficulty has plagued our legal system for over 80 years, leading to countless law review articles announcing novel theories of federalism and constitutional law.[2] The Supreme Court has seemingly fared no better in its endeavor to articulate this distinction, deciding its most recent Erie doctrine case in a fractured multi-part opinion that transcends ideological lines.[3]

Noticeably absent from the *Erie* literature, however, is any investigation into whether the problem at the heart of the Erie doctrine similarly confounds judiciaries in other parts of the world. Given that there are approximately two dozen countries around the world with federal or confederal constitutional features, it seems highly unlikely that we are alone in our quest to turn *Erie*'s holding into a more principled doctrine.[4] Starting from this hypothesis, this paper investigates the extent to which three other federal systems have encountered the same issue *Erie* purportedly resolved and analyzes how those countries have managed the issue or avoided it altogether. It concludes that, at least with respect to the countries studied here, the United States is singular in its susceptibility to the Erie problem due to a unique convergence of several factors discussed more thoroughly below.

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[1] 304 U.S. 64 (1938).
[2] *See, e.g.*, Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).
[3] Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).
[4] *See Countries*, FORUM OF FEDERATIONS (last visited Apr. 16, 2023), https://forumfed.org/countries.

Part I reviews *Erie*'s basic holding and the evolution of the Erie doctrine in the decades following the decision. The goal of this review is to underscore the doctrine's basic elements, the historical and structural components that led to its creation, and the questions that continue to befuddle the Supreme Court. Part II studies the history and constitutional structure of three comparable federal democracies (Australia, Canada, and Germany), highlighting the contours of each country's federal system with a focus on the laws regulating their judicial systems. Each case study will conclude by assessing whether the studied country possesses the components necessary for the Erie problem to arise and, if so, how it has managed to overcome the problem. Part III juxtaposes the federal systems explored in the preceding two parts to determine why the American judiciary is uniquely susceptible to the Erie problem. And Part IV briefly discusses what can be learned from other federal systems about resolving the Erie problem in the United States and the feasibility of implementing those solutions domestically.

[Part I omitted]

II. How Other Countries Have Managed the Erie Problem

There are roughly 25 federal countries in the world today.[5] Nine of these countries, including the United States, are former British subjects that follow a common law or mixed common law legal tradition.[6] It is thus conceivable that at least one other country on this list has encountered some version of the Erie problem or possesses the necessary structural components for it to occur. This Part delves into the history and judicial structure of three of these countries

[5] *See id.*
[6] *Compare id.* (listing all federal countries in the world), *with* Memorandum from Federation of Law Societies of Canada, National Committee on Accreditation (June 2021) (listing all common law jurisdictions), https://nca.legal/wp-content/uploads/2021/10/NCA-Jurisdictions-Policies-Oct-2021.pdf.

and explores whether and to what extent the Erie problem can be observed in their jurisprudence. By analyzing these peer systems, I hope to uncover feasible solutions that the U.S. Congress or Supreme Court could implement domestically to resolve this issue once and for all.

Accounting for the strength of judicial federalism and democratic tradition, I have selected Australia, Canada, and Germany for further study. Each of these countries is home to both national and subnational courts that exercise some amount of lawmaking power.[7] Moreover, these countries are often studied alongside the United States in the field of comparative law for a reason: the similarity of our experience with federalism, our shared democratic values, and the similarity of our basic constitutional structures make them useful benchmarks for drawing comparisons and inspiration. If the Erie doctrine is an inevitable feature of federalism or separation of powers, it should also be detectable in the jurisprudence of these peer countries.

Indeed, as this Part demonstrates, all three possess the requisite structural components for Erie to occur. Only the United States, however, struggles to find its way out of the Erie maze, principally due to the Supreme Court's reliance on the substance/procedure dichotomy.[8] Australia, by contrast, preempted the issue through legislation that mirrors the Conformity Act,[9] which governed the American federal judiciary between 1872 and 1934, while the apex courts of Canada and Germany maneuvered around the Erie issue through constitutional interpretation.[10]

Each of these case studies begins with a brief overview of the countries' formation, followed by an examination of the structure of their governments. This analysis focuses primarily on the judiciary, its relationship with the legislature, and the visions of federalism and separation of powers our founders shared. Along the way, I will also highlight basic features of

[7] *See infra* Part II.A–C.
[8] *See infra* Part III.A.
[9] Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (repealed 1934).
[10] *See infra* Part II.A–C.

each country's judiciary that resemble our own and features that do not. A more thorough exploration of what makes the American judiciary unique will occur in Part III.

What I hope will become apparent by the end of this discussion is that the Erie problem is not the result of any one particular feature of American federalism or separation of powers; after all, Australia, Canada, and Germany were all, in one way or another, inspired by the American Constitution. Rather it is a unique combination of these features in tandem with an equivocal Supreme Court and a paralyzed federal legislature that no other country shares.

A. *Australia*

Modern Australia emerged in 1901 as a federation of British colonies. Beginning with the establishment of New South Wales in 1788, British presence on the continent continued to grow over the next century, resulting in six distinct colonies, each with considerable political autonomy.[11] By the late 19th century, each colony had developed a functioning government—some even possessing a self-written constitution—with a mature judicial system.[12]

Spurred by encroaching foreign colonial powers and a growing sense of national identity, officials from the six colonies met in a series of conventions throughout the 1890s to discuss terms for uniting into a single federation.[13] Like the Constitutional Convention in the United States, the relationship between the established colonial governments and the new federal government occupied a central role in the debates at these conventions.[14] In fact, similarities between the founding of America and Australia were so stark that Alfred Deakin, a key leader of the Australian federation movement, considered James Bryce's *The American Commonwealth*

[11] *See* GABRIELLE APPLEBY ET AL., JUDICIAL FEDERALISM IN AUSTRALIA: HISTORY, THEORY, DOCTRINE, AND PRACTICE 10, 22–29 (2021).
[12] *Id.*
[13] *Id.* at 34–47.
[14] *See id.* at 41–43 (discussing the Framers' initial debates about the distribution of legislative, executive, and judicial power).

mandatory reading for all delegates to the conventions.[15] Andrew Inglis Clark, a co-drafter of the Australian Constitution, also urged delegates to take inspiration from the American Constitution rather than the Canadian Constitution because the former better represented "federation in the true sense of the word."[16]

The strong American influence at these conventions produced a judicial structure that mirrors the American judiciary in many significant respects. From the earliest days of the conventions, it was agreed that the new Australian nation would bifurcate its judiciary, utilizing state courts of general jurisdiction and federal courts of specific jurisdiction.[17] The "heads" of federal jurisdiction established in the new constitution also roughly parallel the heads of federal jurisdiction in the United States, including—as particularly relevant here—suits between citizens of different states (i.e., diversity jurisdiction).[18]

Additionally, the delegates adopted the Madisonian Compromise, which, like Article III of the U.S. Constitution, vests the federal judicial power in the High Court of Australia, the country's apex court, and "in such other federal courts as the Parliament creates."[19] The Constitution also grants the Commonwealth Parliament power to allocate jurisdiction over the nine heads among courts and make other laws "incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."[20]

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[15] *See id.* at 38.
[16] *Id.*
[17] *See id.* at 40–42 (describing early drafts of the Constitution).
[18] *Id.* at 42–43.
[19] *Australian Constitution* s 71.
[20] *See Australian Constitution* ss 51, 76–77.

Unlike the U.S. Constitution, however, the Australian Constitution integrates the federal and state judiciaries to a much greater extent. Section 73, for example, confers on the High Court appellate jurisdiction over "*all* judgments, decrees, orders, and sentences" of state supreme courts, not just those involving a federal question.[21] Thus, the High Court's appellate jurisdiction reaches matters that, in the United States, reside exclusively in the domain of state control.

The High Court's status as the final interpreter of state and federal law had long raised questions about the uniformity of Australia's common law. But these questions were put to rest when, in the 1997 case *Lange v. Australian Broadcasting Corporation*,[22] the High Court finally resolved the question. Its decision recognized for the first time that "[t]here is but one common law in Australia which is declared by this Court as the final court of appeal."[23] The High Court explicitly contrasted this position with the one taken in the U.S., where the common law of each state is distinct.[24] As a result of this ruling, all courts of Australia, regardless of their home jurisdictions, must apply the same rule of decision unless displaced by statute law or the state or federal constitutions.[25]

A second major constitutional difference is that, in addition to the High Court and any lower courts the Parliament may establish, section 71 of the Australian Constitution extends federal judicial power to "such other courts as [the Parliament] invests with federal jurisdiction."[26] This modification to the Madisonian Compromise—the "autochthonous expedient"—grants the Commonwealth Parliament unilateral power to draft state courts into

[21] *Id.* at s 73 (emphasis added).
[22] (1997) 189 CLR 520.
[23] *Lange v Austl Broad Corp* (1997) 189 CLR 520 at 563; *see* Liam Boyle, *An Australian August Corpus: Why There is Only One Common Law in Australia*, 27 BOND L. REV. 27, 27–28 (2015) (asserting that *Lange* was the first case in which the High Court endorsed the idea that a single national common law existed for all of Australia).
[24] *Lange*,189 CLR at 563.
[25] *See id.* ("Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.").
[26] *Australian Constitution* s 71.

service of the federal judiciary.[27] Records from the conventions on federation indicate that at the time of Australia's founding, the Framers were concerned about the additional cost of maintaining a federal judiciary when the colonies already had robust court systems of their own.[28] Thus, in the Judiciary Act of 1903,[29] the country's first major piece of judicial legislation, the Parliament invested state courts with jurisdiction over most of the nine heads, excluding certain matters of national significance that it reserved for the High Court alone.[30] This permitted the federal government to delay creating a parallel federal judicial system until a specific need for one arose.

Crucially, the 1903 Act, which is still in effect today, confers federal jurisdiction on state courts in two parts: First, section 39(1) makes the High Court's original jurisdiction over the nine heads exclusive except as provided for by the Act, thereby stripping state courts of their power to adjudicate such matters.[31] Second, section 39(2) restores jurisdiction to state courts over "all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except [the matters of national significance described above] . . . ."[32] Although it may seem redundant to strip and then restore jurisdiction to adjudicate these issues, the High Court has interpreted this two-part maneuver as ensuring that state courts adjudicating cases under any of the nine heads do so exclusively as organs of the *federal* government.[33]

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[27] APPLEBY ET AL., *supra* note 11, at 45.
[28] *Id.* (citing letter from Josiah Symon, 1897 Convention Judiciary Comm. Chair, to Samuel Griffith, 1891 Convention Drafting Comm. Chair (Apr. 1, 1897) (on file with the National Library of Australia)).
[29] *Judiciary Act 1903* (Cth).
[30] *Id.* at s 39(2) (granting state courts jurisdiction over "all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38").
[31] *Id.* at s 39(1).
[32] *Id.* at s 39(2).
[33] *Felton v Mulligan* (1971) 124 CLR 367; Mary Crock & Ronald McCallum, *Australia's Federal Courts: Their Origins, Structure and Jurisdiction*, 46 S.C.L. REV. 719, 746–47 (1995); Zelman Cowen, *Diversity Jurisdiction: The Australian Experience*, 7 RES JUDICATAE 1, 5–6 (1955) ("It appears that within the Australian structure there is no state jurisdiction in diversity suits at all.").

This scheme has proved fundamental to the development of the Australian judiciary. For much of Australia's history, section 39 has been a vital tool in preserving the domestic government's ability to interpret its own law.[34] Unlike the U.S., which severed legal ties with Great Britain following the Revolutionary War, Australia's movement toward independence occurred gradually over time with consent from both nations.[35] As a result of that ongoing relationship, the Judicial Committee of the British Privy Council effectively served as Australia's court of last resort until 1975 and maintained concurrent appellate authority over state supreme court judgments until 1986.[36] Before the Privy Council's appellate authority was terminated, however, section 39 was a crucial device for resisting its influence—especially as the nation began to recognize itself as distinctly Australian. In operation, section 39 designated all cases under the nine heads as "federal," thereby forcing them through the High Court before appeal could be taken to the Privy Council. Though seemingly a minor procedural hurdle, this system bolstered Australian sovereignty by reinforcing home rule. Such control became particularly important as the nation's Australian identity developed in the latter half of the 20th century.

More recently, it has become clear that section 39 also greatly expands the Commonwealth Parliament's procedural control over the entire Australian judiciary. In the 2017 case *Rizeq v. Western Australia*,[37] the High Court explained that state parliaments lack the

[34] *See* APPLEBY ET AL., *supra* note 11, at 60–61 ("Section 39 of the *Judiciary Act* was drafted to address some of the chaos that might have resulted from having multiple appeal pathways, and to give effect to the policy position . . . that the High Court should stand between State courts and the Privy Council on constitutional cases.").
[35] Although Australia became a self-governing dominion in 1901, the British government reserved certain executive powers over the new federation. *See* Helen Irving, *Making the Federal Commonwealth, 1890–1901 in* THE CAMBRIDGE HISTORY OF AUSTRALIA 242, 242 (Alison Bashford & Stuart Macintyre eds., 2013). Full independence was only attained after both Australia and the U.K. passed the 1986 Australia Act, which recognized "Australia as a sovereign, independent and federal nation." *Australia Act 1986* (Cth).
[36] *See* Crock & McCallum, *supra* note 33, at 735 ("In 1975, Parliament's limitations on this right eliminated such appeals for all practical purposes. Passage of the Australia Acts in 1986 finally extinguished appeals from state courts to the Privy Council.").
[37] [2017] HCA 23.

constitutional authority to "regulate the exercise of federal jurisdiction" in their own courts (which, according to the Court includes but is not the same as court procedure).[38] Rather, any power to regulate courts in the exercise of such jurisdiction must come from the Commonwealth Parliament.[39] Considering how many cases are potentially swept up in all nine heads of federal jurisdiction, including any civil dispute between residents of different states, the implications of this holding are astounding in a federal nation. Although the Commonwealth Parliament has deferred to state procedural law since the passage of the 1903 Judiciary Act, it could at any time repeal the provision doing so.[40]

Going beyond these statutory tools, the High Court has also done its part to expand federal control over the Australian judiciary. It has, for example, taken an extremely broad view of the cases in which federal jurisdiction attaches: since the 1940s, the Court has held that that federal jurisdiction attaches in any case where a claimed right "owes its existence to Federal law or depends upon Federal law for its enforcement," even if the claim itself is asserted under state law. Federal jurisdiction also attaches permanently to any case where it once existed, even if that federal element is no longer present.[41] Additionally, the Court began developing the doctrine of "accrued jurisdiction" in the 1970s—an extremely liberal take on what we in the U.S. call ancillary jurisdiction.[42] Under this doctrine, federal jurisdiction reaches any "matter" in which

[38] *See Rizeq v Western Australia* [2017] HCA 23, 17, 30 ("The Parliament of the Commonwealth alone has power to regulate the exercise of federal jurisdiction.").
[39] *Id.*
[40] *See Judiciary Act 1903* (Cth) s 79(1) ("The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.").
[41] APPLEBY ET AL., *supra* note 11, at 67 (citing LNC Indus v BMW (1983) 151 CLR 575; *Felton v Mulligan* (1971) 124 CLR 367).
[42] *Id.* at 68–71.

there is or once was a federal claim arising out of the same substratum of facts.[43] Considering the breadth of federal jurisdiction and the growth of accrued jurisdiction, the Commonwealth Parliament's procedural control over Australian courts has grown extensively since the nation's founding, often at the expense of state control.

With this abbreviated description of the judiciary in mind—especially the overwhelming breadth of federal jurisdiction—one may get the sense that an Erie-like problem is inevitable. The American and Australian judiciaries share many qualities that are crucial ingredients of Erie: both systems feature parallel state and federal courts, both permit the federal judiciary to hear cases in diversity, and both are common law systems in which judges exercise some amount of judicial discretion, particularly on matters of procedure.

It has been suggested that the mere unification of common law across Australia nullifies any risk of the Erie problem, but this argument is unconvincing.[44] Considering the bare constitutional structure of the courts, absent legislative intervention, Australia finds itself in a position that very much resembles that of the United States. Under the High Court's current jurisprudence, state law cannot independently control the procedure of courts exercising federal jurisdiction, but state law does provide the substantive rule of decision in diversity cases.[45] Based on these conditions, one could imagine a situation in which the common law procedure conflicts with or substantially frustrates the operation of a state statute. In the absence of a federal law that

[43] *See id.* at 69 ("The 'matter' was read by the High Court to refer to the underlying 'justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy,' whether federal- or State-based." (citing *Fencott v Muller* (1983) 152 CLR 570, 603)).
[44] *See, e.g.*, Owen Dixon, Sources of Legal Authority (1943 address to the American Bar Association Section for International & Comparative Law) *in* JESTING PILATE & OTHER PAPERS & ADDRESSES 198, 202 (Law Book Co. 1965)
[45] *See Rizeq v Western Australia* [2017] HCA 23, 9 (concluding that the substantive criminal statute applies of its own force).

expressly defers to state procedure, the question would become whether the state statute or federal practice prevails.

However, the High Court has not had to grapple with this possibility due to a legislative decision of Australia's first Parliament. Section 79 of the Judiciary Act of 1903 directs all courts exercising federal jurisdiction to apply "[t]he laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses . . . except as otherwise provided by the Constitution or the laws of the Commonwealth . . . ."[46] Under this law, there can be no conflict between federal court procedure and state substantive law because federal law has, for nearly Australia's entire history, adopted state procedure. The long-term existence of this rule explains why the High Court has not yet encountered a situation like the one described in the paragraph above. I thus maintain that *Erie* is still constitutionally *possible* in Australia, though under the current statutory regime it is unlikely.

Section 80 of the Judiciary Act also contains a saving clause in case there is any doubt about which law to apply. It provides that,

> So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.[47]

The precise meaning of this provision is still debated, and the High Court has not taken an affirmative position on it.[48] However, the plain text of this section suggests that judge-made

[46] *Judiciary Act 1903* (Cth) s 79(1).
[47] *Id.* at s 80.
[48] *Rizeq*, [2017] HCA at 25 ("No question of the operation of s 80 arises in this appeal, no argument has been directed to s 80 by the parties and interveners, and it is neither necessary nor appropriate to refer further to s 80 in order to explain the operation of s 79 to the extent relevant to the determination of this appeal."); James Stellios,

procedure only applies when there is no other law to apply. The statutorily-created hierarchy of applicable procedural law in this section thus preempts the substance/procedural conflict by taking discretion over which law to apply out of the judge's hands entirely.

[The remainder of Part II omitted]

III. IS THE U.S. REALLY UNIQUE?

With Part II's analysis of other federal systems complete, I now turn to the question I posed at the beginning of this paper: Is the U.S. federal system unique? Analyzing the constitutional structures of each of the countries studied above, the answer to this question must be no. Each of Australia, Canada, and Germany has a strong federal system in which both the national and subnational governments share legislative and judicial power. Moreover, at least two of the other countries studied here (Australia and Germany) are constitutionally committed to separation of powers. But none of them has encountered the constitutional conflict the Erie doctrine purportedly resolves. So how does one explain the United States' status as an outlier?

The existence of diversity jurisdiction in U.S. federal courts provides a partial answer to this question. *Erie* itself was a case predicated on diversity jurisdiction, and most of the work the Erie doctrine does in our federal system is limited to diversity cases. On this front, only Australia shares our dilemma, having granted its federal courts the authority to adjudicate cases under all nine heads of federal jurisdiction. But the fact that Australia grants courts subject-matter jurisdiction over diversity cases and has also managed to avoid the Erie problem indicates that merely the existence of diversity jurisdiction in the U.S. is not a complete explanation.

Choice of Law in Federal Jurisdiction After Rizeq v. Western Australia, 46 AUSTL. BAR REV. 187 (2018) ("[T]he scope of s 80 of the Judiciary Act, and its relationship to s 79(1), were questions left open by the Court.").

In pursuit of a more complete answer, this Part highlights three additional features of the American federal system that the countries studied in Part II approached differently. More precisely, the United States is the only country studied in this paper that relies on a distinction between substance and procedure to determine the rule of decision; it is the only country without a unified national court system; and it is the only country that remains unable to pinpoint the source of the federal judiciary's procedural authority. Juxtaposing our various approaches will provide a basis for the suggestions laid out in Part IV about potential steps American lawmakers could take to fix the Erie problem.

A. *Substance/Procedure Dichotomy*

There would be no Erie problem without reliance on the distinction between substance and procedure to determine the applicable law. It is, after all, an intrinsic part of *Erie*'s fundamental holding. But the problem with the distinction between substance and procedure is that it is largely contrived, as the distinction it represents is not entirely natural or logical. For centuries, Anglo-American law operated without any need to distinguish between the two.[49] It was only during the latter half of the 18th century, when law and equity began to merge in English courts, that the distinction was first observed—a process that happened to coincide with the American declaration of independence from Great Britain.[50]

[49] As Professor Thomas Main observed in a 2003 article, "For centuries prior to Blackstone the substance of the English common law had been buried in the cumbersome procedure of the law courts—and particularly in its pleading rules." Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 28 WASH. L. REV. 429, 454 (2003). In equity courts, by contrast, substance consumed form. *Id.* at 457. These two sides were initially brought together when Blackstone reconceptualized them as a unified legal system in which substantive rights were determined in particular modes of process. *See id.* at 459–60; *see also* Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 875, 882 (2019) ("For centuries the Anglo-American tradition thoroughly integrated and interwove rules of 'procedure' . . . and rules of 'substance' . . . .").

[50] *See* Main, *supra* note 49, at 461–64 (describing the disaggregation of substance and procedure in American federal courts due to the constitutional merger of law and equity).

The early American Congresses codified this newfangled distinction through the Process Acts of 1789 and 1792, which, among other things, required federal courts to employ the procedure of the forum state for actions at common law.[51] With this legislative enactment, a new era began in which the distinction became a crucial consideration in a court's conflict of laws analysis. Even as scholars have universally labeled the substance/procedure distinction "ad hoc" or—more derisively—"organized confusion," modern courts continue to rely on it.[52] The Supreme Court, too, has recognized the difficulty of the substance/procedure distinction, noting in *Hanna v. Plumer* that "every procedural variation is 'outcome determinative' in one sense or another."[53] Although the framework established in *Hanna* brought us closer to an intelligible solution with respect to the Erie analysis itself, the substance/procedure distinction remains evasive in cases where it applies.

How does this experience compare with Australia, Canada, and Germany? As Part II indicates, we are not the only judicial system that has ratified the substance/procedure distinction. In Australia, for example, the High Court's decision in *Rizeq* established that, as a constitutional matter, state courts exercising federal jurisdiction are generally controlled by federal procedural law and state law aimed at primary conduct.[54] But the meaningful difference between Australia and the U.S. is that Australian courts do not, as a result, rely on the substance/procedure dichotomy to decide which law applies. Recall that in *Rizeq* the High Court ruled that the Australian Constitution permits only federal law to "regulate the exercise of federal jurisdiction"—a power that encompasses a laundry list of matters, only one of which is

[51] *See* Process Act of 1789, ch. 21, § 2, 1 Stat. 93 (repealed 1792); Process Act of 1792, ch. 26, § 2, 1 Stat. 275 (repealed 1872).
[52] D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions*,*"* 30 UCLA L. Rev. 189, 202 (1982).
[53] Hanna v. Plumer, 380 U.S. 460, 468 (1965).
[54] Rizeq v Western Australia [2017] HCA 23, 5–9.

procedure.[55] State law aimed at primary conduct, on the other hand, provides the applicable rule of decision.[56] Given the recency of the *Rizeq* decision, more precise rules about what constitutes the regulation of federal jurisdiction are likely forthcoming. However, the High Court emphatically rejected the substance/procedure dichotomy, favoring instead a broader view of the Commonwealth's authority to regulate its own court system.[57]

Nor does section 79 of the Judiciary Act's deferral to state procedure incorporate the substance/procedure dichotomy. Although the statute does direct courts exercising federal jurisdiction to apply state procedural and evidentiary rules, it does so against the background that the same court will also be applying the state law governing primary conduct. Thus, even though courts are instructed on which law to apply in terms that resemble the substance/procedure dichotomy, in practice there is no need for the court to distinguish between the two. The Commonwealth Parliament has already legislatively determined that the applicable law in a diversity suit, whether procedural or substantive, is the law of the state.

Canadian courts have also taken note of the substance/procedure distinction in cases that implicate the legislative interests of the provincial and federal governments. However, the Supreme Court of Canada has held consistently that federal statute law applies in superior courts, regardless of its classification as substantive or procedural, so long as the federal law is a valid exercise of the federal Parliament's legislative power.[58] In the absence of a federal statute, provincial procedure receives secondary priority, and the unified national common law only applies as a last resort.

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See supra* [notes not present in this excerpt] and accompanying text.

In Germany, the federal legislature occupies almost the entire body of substantive and procedural law in all courts, whether national or subnational. There is thus no practical situation in which the laws of the *Länder* would conflict with federal law. Moreover, despite German judges' ability to create law in rather narrow circumstances, the country's civil law tradition discourages judicial discretion. It is therefore extremely unlikely that a court would ever take it upon itself to make the same discretionary choice of applicable law that common law courts do.

B. *Ununified Court System*

The United States also stands out from its peers in that it is the only nation with a parallel rather than unified judiciary. It is a long-established principle of American federalism that states maintain ultimate authority over their own laws, whether statutory or judge-made.[59] The very contention of the *Erie* Court was that dual sovereignty requires federal courts to defer to state authority in claims asserted under state law.[60] There are two consequences of this structure: First, with limited exception, state courts are the court of last resort on state law matters.[61] Second, when federal courts exercise jurisdiction over state law claims, they must faithfully apply state law as interpreted by that state's courts (and in cases where the law has not been interpreted by state courts, the federal court must do its best to guess how a state court would rule).[62]

As it turns out, this dimension of our federal system is quite unique. In Canada and Australia, the apex court has the final word on the statutes enacted by each level of government

[59] *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 350–51 (1819) ("Granting, that . . . the sovereignty of the state, within its territory, over this subject, is but equal to that of the United States; and that all sovereign power remains undiminished in the states, except in those cases in which it has, by the constitution, been expressly and exclusively transferred to the United States . . . .").
[60] 304 U.S. 64, 78–79 (1983) ("[T]he Constitution of the United States, which recognizes and preserves the autonomy and independence of the States -- independence in their legislative and independence in their judicial departments.").
[61] *See supra* [notes not present in this excerpt] and accompanying text.
[62] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that the law to be applied in diversity is the law of the state whether "declared by its Legislature in a statute *or by its highest court in a decision*" (emphasis added)).

and pronounces a singular national common law. It has been noted that the Canadian Supreme Court refrains from exercising appellate review on most provincial law matters, but the authority still exists and is exercised when cases present an issue of national significance. In other words, even if the Canadian Supreme Court declines to interfere in run-of-the-mill issues, it still reserves the most important provincial law questions for itself. The practice of these two countries varies drastically from the United States, where federal courts may only substantively interpret state law if doing so is a necessary precondition of adjudicating an underlying federal right.[63]

Formally, Germany mimics the United States in that the *Länder* possess ultimate interpretive authority over their own laws unless they delegate appellate authority to the federal supreme courts or where other statutory interventions apply. In practice, however, the scope of civil *Land* law is very small due to the existence of a comprehensive federal civil code. This allocation of legislative authority contrasts with American federalism, where states maintain residual lawmaking authority over any area that is not preempted by the much more limited lawmaking power of Congress.[64] Moreover, the procedure in *Land* courts is centrally controlled by a federal code of civil procedure.[65] As a practical matter, then, the German system is more aligned with Canada and Australia because the judiciaries of the *Länder* are similarly subject to federal control.

[63] *See* Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938) ("On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the state's highest court, but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.").
[64] U.S. CONST. amend. X.
[65] Zivilprozessordnung [ZPO] [Code of Civil Procedure], https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (link is to English translation).

C. *Unclear Status of Procedural Common Law*

Finally, comparing judicial federalism in the United States to the other countries discussed in this paper highlights how the unclear legal status of procedural common law in federal courts has contributed to the Erie problem. As things currently stand, the procedural common law of American federal courts simultaneously is and is not federal law depending on the context. Federal judges have long exercised authority to develop rules about internal court administration—an oversight role that many have argued belongs exclusively to the courts.[66] These rules have played a critical role in the day-to-day regulation of one of the three branches of the federal government and, in that sense, occupy the same role as federal law. At the same time, court-developed procedural rules are not binding on states like substantive federal common law is. Moreover, the Erie doctrine holds that judge-made procedure must give way to state law when *Hanna*'s twin-aims test is satisfied, thus indicating that judge-made procedure lacks the preemptive force of federal law.

Against this background, many theories about the source of procedural common law have developed. Some suggest that judges' power over judicial administration is inherent in Article III's Vesting Clause.[67] But if this were the case, the Supremacy Clause should permit judge-made procedure to preempt state law in the same way substantive federal common law does. Others have argued that the power to create procedure exists as a necessary stopgap for Congress's failure to pass comprehensive legislation on courtroom procedure.[68] This explanation is more fitting, though perhaps a little strained, because it explains why judge-made procedure would

[66] *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 833–35 (2008) (exploring arguments about courts' inherent authority to regulate procedure and the corresponding limits on Congress's ability to do so). The Supreme Court has left the question of limits on Congress's ability to regulate court procedure open, although it has implied on several occasions that limits do exist. *Id.* at 834 n. 65.
[67] *See id.* at 846–47.
[68] *See id.* at 847–48.

yield when confronted with applicable law created by a sovereign lawmaking state. A range of explanations exist within these bounds, but the Supreme Court has so far declined to adopt any particular view on the question.[69]

In Australia, Canada, and Germany, by contrast, judicial procedure—whether statutory or judge-made—is expressly tethered to the country's constitutional and legislative structures. In Australia and Germany, procedural rules are controlled entirely by statute. Since Australia's establishment as a federation, the 1903 Judiciary Act has required federal courts to follow state procedure. But insofar as state law is "not applicable or . . . insufficient for some reason," the national common law (which federal courts are constitutionally empowered to create) applies as modified by state law.[70] This structure embeds a clear hierarchy of authority into Australian law: First, federal law controls the procedure in federal courts. Second, because federal law defers to state authority, state procedure becomes the de facto controlling law. Third, if neither federal nor state law applies, federal statute law tells courts to apply the common law. Each of these elements works in sync to eliminate any question about the applicable law. Structurally, it also mitigates any possibility of conflict between federal and state law because both are applied by the legal authority of the same sovereign.

In Germany, on the other hand, the federal Parliament's comprehensive nationwide legislation on civil procedure has regulated both *Länder* and federal courts since 1877.[71] Indeed, the Code of Civil Procedure (ZPO) prescribes the rules of civil actions, the five phases of a civil trial, the appeals process, and rules governing enforcement proceedings.[72] It is true, as I

[69] *See id.* at 877 ("Thus, as matters stand, the historical record offers some support for the proposition that federal courts possess inherent procedural authority, but the support it offers is undeniably modest.").
[70] *Judiciary Act 1903* (Cth) s 80.
[71] NIGEL G. FOSTER, GERMAN LEGAL SYSTEM & LAWS 121 (2d ed. 1996).
[72] *Id.* at 126.

explained in Part II.C, that judges possess some lawmaking authority on the margins, but there is no evidence that such authority would extend to procedural matters. Thus, Germany and Australia are similar, despite their different legal traditions, in that any procedural action their courts take necessarily possesses preemptive power because it is based on clear federal authority.

In Canada, authority over the superior court procedure is shared by the federal Parliament, the parliament of the court's respective province, and the courts themselves. As the Supreme Court has explained, federal statute law always prevails, whether substantive or procedural, provided the applicable legislation results from a valid exercise of its legislative authority. Provincial statute law has purview over all other matters, and the common law kicks in only when neither federal nor provincial law applies. Like Australia, the courts of Canada have inherent power to create common law, but the clear hierarchy above allocates such procedure only tertiary priority, following the exhaustion of both federal and provincial procedure.

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Date of JD/LLB	**May 19, 2021**
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Journal(s)	**Journal of Law & Business**
Moot Court Experience	**No**

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June 10, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a graduate of New York University School of Law and a current litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison LLP. I am very interested in clerking for you during the 2025 term. I worked closely with your former clerk, Kam Ammari, at Paul, Weiss. Kam expressed enthusiasm for my interest in clerking for you and great admiration for your intellectual rigor and judicial approach.

I am confident that I would meaningfully contribute to the work of your chambers as your law clerk. As a judicial intern for the Honorable Colleen McMahon and as an associate at Paul, Weiss I developed strong legal research and writing skills. As a judicial intern, I assisted Judge McMahon with research and drafting in connection with two decisions resolving motions to dismiss. The cases involved alleged constitutional violations and breach of a commercial contract. As a litigation associate, I have been responsible for procedural and substantive research at all stages of litigation to inform and guide litigation strategy and filings in a broad variety of cases including contractual disputes, tort cases, restructuring litigation, investigations and litigation conducted by state attorneys general, internal investigations, and federal criminal investigations. I have also drafted complete or substantial portions of critical filings in these cases including motions to dismiss, motions for summary judgment, motions in limine, mediation briefs, appellate briefs, answers, and counterclaims. In addition to my research and writing experience, I have prepared witnesses for depositions, second-chaired depositions, and prepared for two trials (that settled just before trial) including drafting evidentiary modules, orders of proof, and exhibit lists.

Enclosed is my resume, law school transcript, undergraduate transcript, and a writing sample. You will also receive three letters of recommendation under separate cover from Mr. William Clareman, a partner at Paul, Weiss, Professor Trevor Morrison and Professor Geoffrey Miller. I was a student in Professor Morrison's Constitutional Law class. I was a student, and subsequently a teaching assistant, in Professor Miller's Civil Procedure class. I also served as a research assistant for Professor Miller. In addition, I have four professional references who are happy to speak with you: Hon. Loretta Lynch, Paul A. Paterson, Kamil Ammari, and Robert

Radick. I have worked closely with the Honorable Loretta Lynch, Paul Patterson, and Kamil Ammari at Paul, Weiss. Prior to attending law school, I worked as a paralegal at Morvillo Abramowitz Grand Iason & Anello PC where I worked closely with Robert M. Radick.

Below is the contact information for my recommenders and references:

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Robert M. Radick	Phone: (212) 880-9558	Email: rradick@maglaw.com

I believe I can provide meaningful support to you by serving as your law clerk and would welcome the opportunity to discuss my background and experience in more detail. Thank you very much for your consideration.

Respectfully,

Benjamin J. Shack Sackler

Enclosures

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EDUCATION

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Journal of Law & Business, Editor-in-Chief
Program on Corporate Compliance & Enforcement, Student Fellow
Activities: Law & Business Association, Events Co-Chair
Police Investigation Partnership Project, Student Investigator
Civil Procedure Teaching Assistant for Professor Geoffrey P. Miller

BROWN UNIVERSITY, Providence, RI
A.B. in Music, with honors, May 2016
GPA: 3.89
Senior Thesis: *On a Plane: An Interactive Audio Installation*
Honors: *Distinguished Senior Thesis Award* (Nominated by the Department of Music)
Marion Hassenfeld Premium, for excelling in music or music appreciation
Buxtehude Premium, for excellence in major
Activities: *Rhode Island Hospital*, Emergency Department Research Assistant
Small Victories, Concert Organizer
Knight Memorial Library, Volunteer

EXPERIENCE

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, New York, NY
Litigation Associate, October 2021 – Present; ***Summer Associate***, June 2020 – July 2020
Represents clients in a broad range of complex matters, focusing on regulatory enforcement, internal investigations, M&A and restructuring litigation, and complex commercial litigation. Maintains active pro bono practice focusing on criminal appeals and non-profit internal investigations. Responsible for researching legal issues at every stage of litigation, drafting briefs, factual development and analysis in close partnership with clients, preparing fact and expert witnesses for testimony, negotiating with counterparties regarding discovery, and managing voluminous document review projects.

PROFESSOR GEOFFREY P. MILLER, NYU SCHOOL OF LAW, New York, NY
Research Assistant, January 2020 – August 2020
Assisted Professor Miller in researching and updating a chapter in *Principles of the Law: Compliance and Enforcement for Organizations* published by the American Law Institute. Conduced a literature review for a forthcoming article.

HON. COLLEEN MCMAHON, U.S. DISTRICT COURT, S.D.N.Y., New York, NY
Judicial Intern, June 2019 – August 2019
Researched and prepared memoranda and drafts to assist Judge McMahon in resolving motions to dismiss relating to issues including limitations of quasi-contractual remedies, alternative pleadings, Section 1983 claims, and qualified immunity. Observed various civil and criminal hearings, conferences, trials, and sentencings.

MORVILLO ABRAMOWITZ GRAND IASON & ANELLO PC, New York, NY
Paralegal, August 2016 – June 2018
Worked closely with partners and associates providing legal assistance with criminal and civil litigation including securities enforcement cases, regulatory and criminal enforcement, and internal investigations. Tasks included legal research, organizing and reviewing discovery and court filings, document productions, attending and memorializing interviews and proffers, and editing law journal articles and treatise revisions. Worked closely with a criminal defense trial team on a two month long federal trial.

ADDITIONAL INFORMATION

Enjoy skiing, golf, tennis, and cooking.

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Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2018

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Gary Michael Parsons			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Kim A Taylor-Thompson			
Procedure	LAW-LW 11650	5.0	A
Instructor: Geoffrey P Miller			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: The President and Immigration			
Instructor: Adam B Cox			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2019

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A-
Instructor: Trevor W Morrison			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Gary Michael Parsons			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Brookes D Billman			
Torts	LAW-LW 11275	4.0	B+
Instructor: Mark A Geistfeld			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: The President and Immigration			
Instructor: Adam B Cox			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2019

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	A-
Instructor: Marcel Kahan			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Geoffrey P Miller			
Property	LAW-LW 11783	4.0	B+
Instructor: Richard A Epstein			
Intellectual Property Crimes Seminar	LAW-LW 12451	2.0	A-
Instructor: Harry First			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
--

Survey of Securities Regulation	LAW-LW 10322	4.0	CR
Instructor: James B Carlson			
Business Crime	LAW-LW 11144	4.0	CR
Instructor: Jennifer Hall Arlen			
Income Taxation	LAW-LW 11994	4.0	CR
Instructor: Laurie L Malman			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Geoffrey P Miller			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	56.0	56.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Business Transactions Clinic	LAW-LW 10195	3.0	A
Instructor: Naveen Thomas Jillian C Schroeder-Fenlon			
Business Transactions Clinic Seminar	LAW-LW 11302	2.0	A
Instructor: Naveen Thomas Jillian C Schroeder-Fenlon			
Journal of Law and Business	LAW-LW 11317	1.0	CR
Federal Courts and the Federal System	LAW-LW 11722	4.0	A-
Instructor: Trevor W Morrison			
Professional Responsibility in the Corporate Context	LAW-LW 12346	2.0	A
Instructor: David B. Harms			
Current Issues in Civil Liberties Seminar	LAW-LW 12610	2.0	A-
Instructor: Steven Shapiro			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	70.0	70.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Issues in SEC Enforcement Seminar	LAW-LW 10386	2.0	A-
Instructor: Walter Ricciardi			
Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Andrew Weissmann			
Journal of Law and Business	LAW-LW 11317	1.0	CR
Evidence	LAW-LW 11607	4.0	B+
Instructor: Daniel J Capra			
Corporate Governance Seminar	LAW-LW 12621	2.0	A
Instructor: Edward Baron Rock Martin Lipton Wendell Lewis Willkie			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	83.0	83.0

Staff Editor - Journal of Law & Business 2019-2020
Editor-in-Chief - Journal of Law & Business 2020-2021

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

The following guidelines represent NYU School of Law's current guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A+ = 0-2%	**A** = 7-13%	**A-** = 16-24%
B+ = 22-30%	**B** = Remainder	**B-** = 0-8% (First-Year JD); 4-11% (All other JD and LLM)
C/D/F = 0-5%	**CR** = Credit	**IP** = In Progress
EXC = Excused	**FAB** = Fail/Absence	**FX** = Failure for cheating
*** = Grade not yet submitted by faculty member		
Maximum for A tier = 31%; Maximum grades above B = 57%		

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

***Pomeroy Scholar**:*	Top ten students in the class after two semesters
***Butler Scholar**:*	Top ten students in the class after four semesters
***Florence Allen Scholar**:*	Top 10% of the class after four semesters
***Robert McKay Scholar**:*	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year or to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

Updated: 9/14/2020

June 12, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to convey my very strong recommendation of Benjamin Shack Sackler for a clerkship in your chambers. Benjamin will be a terrific law clerk. He has my enthusiastic support.

I got to know Benjamin as a student in my Constitutional Law class during the spring of his first year. Throughout the semester, he was an active and thoughtful participant in our classroom discussions. His answers to my questions and his volunteered comments reflected that he was engaging with the material in a consistently sophisticated way. Benjamin also did very well on the final exam, which was blind-graded. The exam contained three questions, two of the issue-spotting variety and one that dealt more with matters of interpretive theory. Benjamin did well on all parts, earning a high A- that was just short of an A.

Benjamin was a student in my Federal Courts class in the fall of his third year. Once again, he performed very well. He was a great participant in classroom conversations, both in person and on Zoom. He raised very perceptive questions during class and in office hours, and it was clear that he was really passionate about the material. His final exam, which was structured quite similarly to the Constitutional Law exam, was also very good. Among other things, the exam was extremely well written: clear, concise, and precise, without sacrificing depth or nuance. He earned another high A-. This was an especially noteworthy achievement in that Federal Courts class, which included a high percentage of the top students in his graduating class.

Outside the classroom, Benjamin was an active member of the NYU Law community. He served as Editor-in-Chief of the NYU Journal of Law & Business and was a student fellow with the Program on Corporate Compliance & Enforcement. He was also a member of the Law & Business Association, and a Student Investigator with the Police Investigation Partnership Project. He also served as both a Research Assistant and a Teaching Assistant to my colleague, Professor Geoff Miller.

In short, I have an extremely high opinion of Benjamin. In addition to being very smart, hardworking, and a talented writer, he is friendly and self-effacing in a way that makes it easy to envision him fitting in well to virtually any chambers. I know he will be an outstanding clerk, and I urge you to give him close consideration.

Please do not hesitate to contact me if you would like to discuss Benjamin further.

Sincerely,
Trevor Morrison

Trevor Morrison - trevor.morrison@nyu.edu - 212-998-6000

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June 13, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Recommendation of Benjamin Shack Sackler

Dear Judge Matsumoto:

My name is Billy Clareman. I am a Partner in the litigation department at Paul, Weiss, Rifkind, Wharton & Garrison LLP. I am thrilled to recommend Ben Shack Sackler to be your law clerk.

I have been a partner since 2016, and have spent my entire legal career at Paul, Weiss following a one year clerkship for the Honorable P. Kevin Castel in the District Court for the Southern District of New York. For the past several years, my practice has focused on financial restructuring, bankruptcy litigation, and related disputes. I have worked with many fantastic associates at Paul, Weiss, but Ben has really distinguished himself as a particularly bright, hard-working, thoughtful, and talented young lawyer.

I worked closely with Ben on a significant litigation we handled for Revlon, Inc. in late 2022 and early 2023. Paul, Weiss was debtors' counsel for Revlon in its chapter 11 case. A central issue in the bankruptcy concerned a dispute between Revlon and its lenders regarding a refinancing transaction that Revlon executed in 2020. Certain of the lenders alleged that the refinancing breached their credit agreement with the Company, and sued in the bankruptcy court to unwind a series of refinancing transactions.

The ensuing litigation was on an extremely expedited schedule—the complaint was filed on October 31, 2022, and set for trial in March 2023—and involved complex legal and factual issues. Ben really impressed me with how quickly he was able to understand and analyze the issues in a short amount of time. Because of the compressed schedule, our team had to simultaneously brief a motion to dismiss, file counterclaims, proceed with fact and expert discovery, and prepare the case for trial—all in a matter of months.

Ben was instrumental in this effort. He was one of the first associates who joined our team and became a leader among the associate group. I observed Ben perform at a consistently high level over many months of intense litigation. On a large team comprised of many lawyers, Ben went above and beyond and truly distinguished himself on the matter.

In the early stages, Ben was asked to analyze key legal issues, and simultaneously help develop our evidentiary record. His research on complex issues concerning the availability of equitable remedies under state law and federal bankruptcy law was particularly important to arguments we made successfully in our motion to dismiss. Ben was also instrumental in helping to develop our factual record. I was extremely impressed with how Ben was able to identify key issues and develop thoughtful and nuanced analyses. I worked closely with Ben to prepare two key witnesses for their depositions. Ben was a direct participant in the prep and was entrusted with walking the witness through key documents that included a lot of technical detail. He did a terrific job working with the witnesses, and I was extremely impressed with Ben's ability to translate complex issues into key themes.

Ben is also a pleasure to work with. The case I handled with Ben was a fast-paced, high-stress matter with lots of long nights and weekends in the office. I could not have asked for a better attitude than Ben's. Ben's unflaggingly positive attitude greatly benefited the entire team. His personality and work ethic and "team-first" attitude make him very well suited to working as a law clerk.

I am delighted that Ben is looking to clerk and he is an excellent candidate. I enthusiastically recommend him for the position. If you have any questions or would like to discuss my recommendation further, please do not hesitate to reach me by phone or email.

Respectfully,

/s/ William Clareman

William Clareman

New York University
A private university in the public service

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June 12, 2023

RE: Benjamin Shack Sackler

Dear Judge:

I write to recommend Benjamin Shack Sackler for a clerkship in your chambers. Ben is a recent graduate of NYU School of Law and therefore is not participating in the clerkship process for second-year students.

After graduating from college, Ben worked for two years as a paralegal at one of the nation's premier criminal defense law firms. I believe that experience contributed to the highly developed legal skills that Ben displayed from the moment he set foot in Vanderbilt Hall (NYU School of Law's main building).

Ben was a student in my first-year Procedure class in 2018. He displayed an excellent ability to think on his feet and to embody complex ideas in terse and cogent answers – capacities he displayed on his examination, which received the "A" grade that I reserve for the top 10% of exams. Ben's academic performance has become even more impressive since then. In the Fall of 2020, he pulled off the nearly impossible feat of receiving five marks in the "A" range – three As and two A-s. In the spring of 2021, Ben received two B+'s an A- and an A.

Based on his exceptional performance in my 2018 class, I asked Ben to serve as a teaching assistant in my Procedure class in the Fall of 2019. Ben stood out among a group of amazing TAs, taking a leadership role in organizing joint sessions and compiling instructional materials for his students.

Ben is a superb writer and a wonderful, imaginative person – a lover of music as well as an avid striped bass fisherman.

Ben would be a capable and delightful clerk, and I am pleased to offer him my most enthusiastic recommendation.

Sincerely,

Geoffrey Parsons Miller
Stuyvesant P. Comfort Professor of Law

Benjamin J. Shack Sackler – Writing Sample

Enclosed please find a my writing sample consisting of a draft reply brief completely written by me in connection with a case I worked on at Paul, Weiss. The draft brief was subsequently edited by me. A later draft with additional associate and partner input was ultimately filed in the Maryland Appellate Court (then the Maryland Court of Special Appeals).

The draft brief argues that there was insufficient evidence of knowledge, in the form of willful blindness, for the trial court to convict our client, Mr. Steven Albert Woodall, of driving on a revoked license. It further argues that the trial court incorrectly applied an objective negligence standard to define willful blindness, rather than the required subjective knowledge standard.

No. 1111, Sept. 2021 Term

In the Court of Special Appeals of Maryland

STEVEN ALBERT WOODALL, APPELLANT

v.

STATE OF MARYLAND, APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
FOR QUEEN ANNE'S COUNTY (NO. 17-CR-21-000232)
(THE HONORABLE LYNN KNIGHT, J.)

REPLY BRIEF OF APPELLANT

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DRAFT

INTRODUCTION

The State's brief offers no compelling reason why Appellant Steven Albert Woodall's conviction for driving on a revoked license should stand. Mr. Woodall's conviction rests on woefully insufficient evidence.

Regardless of whether Mr. Woodall "should have known" that his license was revoked, the State had to prove that he had knowledge of the revocation—that is, that he either actually knew or was willfully blind. On a sufficiency of the evidence challenge, it is this Court's duty to determine, *de novo*, whether the trial court applied the correct legal standards when it evaluated the evidence. The trial court did not. And it is this Court's duty to determine whether the State produced sufficient evidence to prove knowledge beyond a reasonable doubt, either actual knowledge or knowledge in the form of willful blindness. The State did not. For those reasons, the court erred in convicting Mr. Woodall and his conviction should be reversed.

ARGUMENT

The State's evidence at trial was legally insufficient to support a guilty verdict. Although this court must view the evidence that is presented in the light most favorable to the State, the State has the burden of showing *some* evidence that Mr. Woodall knew his license was revoked or was willfully blind to that fact. However, Mr. Woodall was convicted

with *no* evidence of knowledge, not even in the form of willful blindness. Maryland Code of Transportation Section 16-303(d), the statute Mr. Woodall was convicted under, imposes a knowledge standard that can be satisfied by showing actual knowledge or willful blindness. Willful blindness is a form of knowledge, not a substitute for knowledge. The trial court erroneously applied an objective negligence standard rather than the subjective willful blindness standard when it considered whether Mr. Woodall "should have known" his license was revoked. The trial court was required to determine whether Mr. Woodall (a) subjectively believed there was a high probability that his license was revoked when he was driving on January 27, 2021 and (b) took deliberate steps to avoid learning the truth. Because the trial court applied the incorrect standard and because the State produced no evidence that either prong of the willful blindness test had been met, Mr. Woodall's conviction should be reversed.

Faced with a complete lack of evidence of willful blindness, the state attempts to rely on an unrelated entry on Mr. Woodall's driving record with an untenable interpretation of the record to meet its burden. We respectfully submit the Court should see through this mischaracterization. No reasonable fact finder could have found that the State proved the knowledge element of Section 16-303(d) beyond a reasonable doubt.

I. THE STATE IS REQUIRED TO PROVE ACTUAL KNOWLEDGE OR WILLFUL BLINDNESS

It is undisputed that there is no evidence of actual knowledge in this case. *See* Appellant's Br. 17-18; State Br. 2, 9. Accordingly, the State's only theory is that Mr. Woodall knew his license was revoked because he "was 'willfully blind' or 'deliberately ignorant' as to the fact of the revocation." State Br. 2 (citation omitted). But "willful blindness" is not the standard that the trial court applied or that the State advances on appeal. Instead, the trial court held that Mr. Woodall "should have known" that his license had been revoked, App. 2, and the State argues that Mr. Woodall "should have made an inquiry" with the MVA, State Br. 7. That is not the law. Whether or not Mr. Woodall "should have known" that his license was revoked in January 2021 is irrelevant. To find that Mr. Woodall was willfully blind, the trial court was required to find that Mr. Woodall both (a) subjectively believed there was a high probability that his license was revoked and (b) took deliberate steps to avoid learning the truth. When the trial court found that Mr. Woodall "should have known" his license was revoked and "should have made an inquiry" with the MVA, it applied an objective negligence standard rather than the subjective willful blindness standard.

DRAFT

1. The State has the burden to prove, beyond a reasonable doubt, that Mr. Woodall had knowledge that his license was revoked. *See State* v. *McCallum*, 321 Md. 451, 457 (1991), *aff'g*, 81 Md. App. 403 (1990); *Steward* v. *State*, 218 Md. App. 550, 559 (2014), *cert. denied*, 441 Md. 63 (2014). Justice Howard Chasanow's concurrence in *McCallum* explained that knowledge can come in multiple forms. One form is actual knowledge—"an actual awareness or an actual belief that a fact exists." *McCallum*, 321 Md. at 458 (Chasanow, J. concurring). Another form is "deliberate ignorance" or "willful blindness." *Id.* Drawing from federal law, Justice Chasanow surveyed various scenarios that could give rise to willful blindness. *See id.* at 459-460 (discussing *United States* v. *Hiland*, 909 F.2d 1114 (8th Cir. 1990); *United States* v. *Feroz*, 848 F.2d 359 (2d Cir. 1988); *United States* v. *Picciandra*, 788 F.2d 39 (1st Cir. 1986)).

2. To be willfully blind, one must "believe[] that it is probable that something is a fact," but "deliberately shut[] his or her eyes" or "avoid[] making reasonable inquiry with a conscious purpose to avoid learning the truth." *Rice* v. *State*, 136 Md. App. 593, 601 (2001) (citation omitted). Willful blindness is "a *form* of knowledge, not a *substitute* for

knowledge." *Id.* (citation omitted) (emphasis in original). "[M]ere negligence . . . is not sufficient" and if a defendant "actually believed that his license was not [revoked], he could not be guilty of the offense." *Id.*

The United States Supreme Court recently clarified the standard for willful blindness in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754 (2011). This is instructive here Maryland law on willful blindness, as articulated in Judge Chasanow's concurrence in *McCallum*, finds its basis in federal law. In *Global-Tech Appliances*, the Court wrote that "a reckless defendant is one who merely knows of a substantial and unjustified risk of . . . wrongdoing, and a negligent defendant is one who should have known of a similar risk but, in fact, did not," whereas the willfully blind defendant is one who (1) "subjectively believe[s] that there is a high probability that a fact exists," and (2) "take[s] deliberate actions to avoid learning of that fact." *Id.* at 769-770.

3. The trial court did not apply this standard. *See* Appellant's Br. 23-24. Instead, the court held that Mr. Woodall "should have known" that his license had been revoked. App. 2. But "evidence that an individual 'should have known' a fact is not sufficient to prove that the individual . . . was deliberately ignorant of the fact." *Steward*, 218 Md. App. at 567. The State wholly ignores Mr. Woodall's arguments that the trial court committed legal error.

Instead, the State argues that Mr. Woodall "should have made an inquiry" with the MVA after an unspecified period of time. Appellee's Br.7, 10; *see also* App. 2. Like the trial Court, the State also applies the wrong standard. If a mere lack of inquiry was sufficient without any evidence that Mr. Woodall's *subjectively* believed that there is a high probability his license was revoked or any evidence of deliberate steps Mr. Woodall took to avoid learning the status of his license, the line between negligence and knowledge would be indistinguishable.

The cases the State cites in its brief do not support its position as they all involved evidence of the defendants' subjective beliefs and deliberate steps taken to avoid learning the truth.

In *McCallum*, Judge Chasanow wrote that the defendant could be deemed willfully blind if (1) "based on his failure to pay district court fines and failure to appear in court," the defendant "knew that it was probable that his license was suspended"; (2) the defendant "failed to fulfill his obligation to keep MVA apprised of his current address," or "failed to contact MVA after learning that for several months his mail was destroyed"; and (3) the defendant "deliberately avoided contact with MVA to avoid receiving notice of the suspension of his driver's license." *Id.* at 461 . *See McCallum*, 321 Md. at 461 (Chasanow, J. concurring). Judge Chasanow thus concluded that Mr. McCalum knew that his license was probably suspended and took